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THE HISTORY OF
THE SUPREME COURT
OF THE
UNITED STATES

WITH
BIOGRAPHIES
OF ALL
THE CHIEF AND ASSOCIATE JUSTICES

BY
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ILLUSTRATED

WITH PORTRAITS OF THE JUDGES

ENGRAVED BY MAX AND ALBERT ROSENTHAL.

VOLUME II.

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"What, Sir, is the Supreme Court of the United States? It is the august representative of the wisdom and justice and conscience of this whole people, in the exposition of their constitution and laws. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of Constitutional power. It is the great moral substitute for force in controversies between the People, the States and the Union."—HORACE BINNEY.

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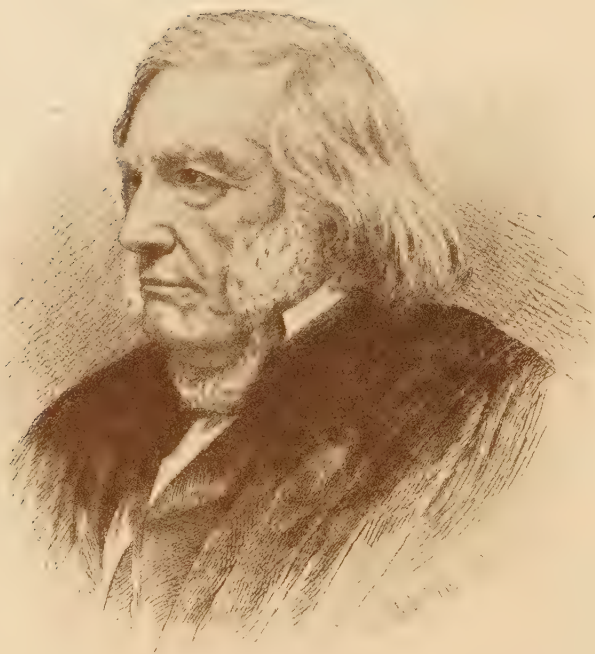
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Samuel Nelson

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WE now approach the most memorable part of the career of Chief Justice Taney, marked by the decision in *Dred Scott v. Sandford*, *Ableman v. Booth* and others which immediately preceded the outbreak of the Civil War. But before considering these cases, and others which led to them, it is proper to notice several changes which had taken place in the composition of the Bench.

Mr. Justice Thompson had died upon the 18th of December, 1843, and his place was filled by the appointment of Samuel Nelson, of New York, who was commissioned upon the 13th of February, 1845, and who remained in judicial harness until the latter part of 1872, when he retired under the provisions of the Act of April 10, 1869.

Samuel Nelson was born at Hebron, Washington County, New York, on the 10th of November, 1792, of Scotch-Irish

lineage, his ancestors having immigrated to this country in 1760. He was a graduate of Middlebury College, Vermont, in 1813, subsequently studied law under Chief Justice Savage, and, in 1817, was admitted to the Bar of Madison County, New York. In trying his first suit his discernment detected an error in practice on the part of an experienced opponent, and it was not long before he attracted attention by his skill in the trial of cases which won for him both reputation and clients. In 1820 he entered politics as a Presidential Elector, served as village postmaster, and two years afterwards was a delegate to the State Constitutional Convention, where he advocated the excision of a clause prescribing the property qualifications of voters. In 1823, at the age of thirty, he became one of the Judges in the Circuit Courts organized under the provisions of the Constitution which he had assisted in framing, William A. Duer and Reuben Walworth being among his Associates. After eight years' service upon this bench he became one of the Associate Justices of the Supreme Court of the State, in place of William L. Marcy, and, six years later, its Chief Justice, presiding in this capacity for eight years. In 1844, he was a member of a second State Constitutional Convention, and advocated changes in judicial tenure, warmly contending for the election of the judges by the people. In the following year he was appointed by President Tyler to succeed Mr. Justice Thompson upon the Supreme Bench of the United States, and held his place until his resignation, in December, 1872, at the age of eighty, his judicial career having covered nearly half a century—a service without a parallel in the history of jurisprudence. In 1871, he was appointed by President Grant a member of the Joint High Commission to arbitrate the Alabama Claims on the part of the United States, on account of



Levi Woodbury

his proficiency in international law. A man of learning, sagacity, impartiality and integrity, acute, earnest and erudite, of kindly deportment towards the members of the Bar, of elevated conceptions of justice and right, and of particular knowledge and skill in the application of the law relating to patents, his judicial opinions constitute an impressive monument to his name.

Levi Woodbury, of New Hampshire, had the distinguished honor of succeeding to the place vacated by the death of Mr. Justice Story. He was commissioned in the recess, September 20, 1845, and re-commissioned, on confirmation, January 3, 1846. His term of judicial service was short, as he died in September, 1851. He is best known to the country for his services as a Senator of the United States, but his dissenting opinion in *Waring v. Clarke* is marked by such extraordinary and powerful reasoning, in which he denies that the admiralty jurisdiction extends within the body of a county even upon tide waters, that it is a matter of doubt whether his capacity as a jurist was not greater than a long life of public service had proved it to be as a statesman.

He was born in Francestown, New Hampshire, on the 22d of December, 1789, and claimed descent from English ancestors who had settled at Cape Ann four years after the Landing of the Pilgrims. He graduated with the highest honors of his class from Dartmouth College in 1809, and thereupon entered the Law School at Litchfield, Conn. He continued his legal studies in Boston, Exeter and Francestown, and was admitted to the bar in 1812, meeting with great success. Chosen in 1816 to be Clerk of the State Senate, in the following year he was appointed Judge of the Supreme Court of the State. Two years later he removed to Portsmouth, where he continued to reside, and was elected

Governor in 1823, Speaker of the State House of Representatives in 1825, and was sent to Congress as a Senator of the United States, serving from 1825 to 1831. In politics he was an ardent Democrat, and at the end of his Senatorial term was appointed by President Jackson Secretary of the Navy, the duties of which office he discharged for three years, when he was transferred to the Treasury Department by President Van Buren, remaining in the Cabinet until the close of 1841. He was then again chosen a Senator of the United States, and served until 1845, when he was appointed by President Polk to be an Associate Justice of the Supreme Court of the United States, his nomination being confirmed without opposition. A short time previous to this appointment he had declined the position of Minister to England. His Alma Mater conferred upon him the degree of LL.D. in 1823, and he was a noted member of various literary societies. After his death a volume of his political, judicial, and literary writings was published in Boston which attests his attainments as a scholar. He was also known as the editor of a volume of law reports in connection with Judge Richardson, of New Hampshire. Thomas H. Benton termed him the "Rock of New England Democracy" for the part he took in the celebrated Senatorial debate relating to public lands. He also made himself conspicuous in the session of 1841 in defending the independent treasury system which was first established under his administration of that department, and in defeating the bank system of Henry Clay. He voted against the increase of the Navy, and in 1844 against the annexation of Texas. He enjoyed a succession of exalted public honors, but he thought much less of them than of the duties they entailed. Chief Justice Taney said of him: "He had been a member of the Court but a few years; yet he was long enough on the bench to leave behind him, in



Al. Hien

the reports of the decisions of the Court, the proofs of his great learning and industry, and of his eminent qualifications for the high office he filled."

Robert C. Grier, of Pennsylvania, was commissioned on the 4th of August, 1844, as an Associate Justice in the place of Henry Baldwin, deceased. He was not the original choice of President Tyler. The place was first offered to the celebrated John Sergeant, who declined it on the ground that being more than sixty years of age he had resolved to accept no public position, but with the suggestion that it be offered to Horace Binney, without informing him of his own declination or his reason. Mr. Binney declined it for the same reason, and suggested that the place be offered to Mr. Sergeant, with a similar injunction of secrecy as to his action. Mr. Grier was born on the 5th of March, 1794, on a farm in Cumberland County. His father was a clergyman, who gave him personal instruction until he was prepared to enter Dickinson College. For one year after graduation he taught in a grammar school attached to the College, but after that time went to Northumberland County to assist his father, who was a superior Greek and Latin scholar, whom he succeeded as principal of an academy in 1815, lecturing upon astronomy and chemistry, serving as professor of the classics and mathematics, and securing for his institution the library and philosophical apparatus of the celebrated Joseph Priestley. He then turned his attention to the law, under the direction of Charles Hall, an eminent practitioner of Sunbury; was admitted to the bar in 1817, and for nineteen years was engaged in active practice in Bloomsburg and Danville. Attaining professional distinction at an early age he was enabled to support his mother and educate ten brothers and sisters. At the age of forty-six years his reputation was so well established that he was made

President Judge of the District Court of Allegheny County, which caused his removal to Allegheny City. There he resided until 1848, after which time he made his home in Philadelphia during the rest of his life. Originally a Federalist, he acted with the Democratic Party until the outbreak of the civil war, when he attached himself ardently to the cause of the Union. He delivered the opinion of the Court in the Prize Cases, involving principles which were vital to the successful conduct of the war and the preservation of the integrity of the Union. Upon his resignation from the Supreme Court, in 1870, President Grant addressed to him a letter of regret, in which he expressed his appreciation of the great service which he was able to render to his country in the darkest hour of her history, by the vigor and patriotic firmness with which he "upheld the just powers of the government, and vindicated the right of the nation to maintain its own existence."

Possessed of sound judgment and great legal knowledge, he earned the good will and admiration of the entire profession. His learning was rich and varied, his comprehension of legal principles was clear, his power of close reasoning and forcible expression was striking, his character was marked by uprightness, simplicity and independence. He discharged his judicial duties with zeal and fidelity. His opinions contain no dicta, and form no essays; with very little quotation, they show, not the less, extensive learning and research. His sparse references to authority were "the result of selection and not of penury." His personal life was pure and blameless, graced by modesty and refinement. As a lawyer, tested by professional standards, he occupies a front rank among the jurists of America. He had the singular experience of "attending," as Mr. Evarts said, "the funeral of his successor,"

He had resigned his place under the provisions of the Act of April 10th, 1869; his retirement to take effect on the 1st of February, 1870. The Hon. Edwin M. Stanton was appointed and duly commissioned upon the 20th of December, 1869, the commission to take effect the following February, but Mr. Stanton died four days afterwards, on the 24th of December, 1869.

Mr. Justice Woodbury died on the 4th of September, 1851, and Benjamin R. Curtis, of Massachusetts, was commissioned as his successor, during the recess, upon the 22d of September, 1851, and recommissioned, on confirmation, upon the 20th of December, of the same year. The appointment was made by President Fillmore at the earnest solicitation of Mr. Webster, then Secretary of State. Although holding his place for the brief period of six years, he established a judicial reputation second to none of his associates, and in conjunction with Mr. Justice Campbell, appointed a year later, brought to the bench an accession of judicial strength which rendered its opinions upon purely legal questions of the utmost value to the profession. Curtis was as deeply learned in the Common law and the principles of Chancery, as Campbell was in those of the Civil law and the Code of Louisiana. Born in widely sundered States, these men represented the opposite extremes of legal doctrine and professional training, and presented in contrast the most remarkable judicial qualities developed under diverse systems of education. Curtis was deeply imbued with the spirit of those sturdy statutes of Anglo-Saxon times which found their highest expression in Magna Charta and the Bill of Rights, and was in thorough sympathy with the doctrine of Lord Mansfield, announced in the case of the negro Somerset, that the soil of England was too free to be polluted by the footsteps of a slave. Campbell

was thoroughly inoculated with the principles of the great system of Roman law, which, however great its merits, was poisoned by the maxim that the will of the prince was the law of the subject. Both, in later life, after their resignation from the bench, attained to the most illustrious station as advocates at the bar.

Benjamin Robbins Curtis was born at Watertown, Massachusetts, on the 4th of November, 1809. He was of English descent, and his ancestors had emigrated in the ship "Lyon," and landed at Boston on the 16th of September, 1632. Upon his mother's side he was descended from Sarah Eliot, a sister of John Eliot, the "Apostle to the Indians." His grandfather was a physician, and his father a merchant who had made several voyages as supercargo, and afterwards as Master. His mother was Lois Robbins, of Watertown, a daughter of James Robbins, a prominent and respected citizen, who had carried on various branches of manufacturing, and had been interested in a country store. The future Associate Justice was their elder son, the younger being George Ticknor Curtis, the accomplished historian of the Constitution, the author of the *Lives of Webster* and of *James Buchanan*, and one of the counsel who argued the *Dred Scott* case in behalf of the slave. Benjamin was educated at Harvard College, having enjoyed early opportunities for reading under the direction of his mother. He won prizes, and took high rank as a scholar, displaying evident capacity for the legal profession. He entered the Law School at Cambridge, where he enjoyed the lectures of Mr. Justice Story, and finished his studies at Northfield under the direction of John Nevers, an old-fashioned lawyer, but not a man of distinction or remarkable ability.

His youth was passed in close and intimate friendship



D. N. Curtis

with his uncle, George Ticknor, a celebrated man of letters. In 1832 he was admitted to the bar, and very early in the course of his professional career gave evidence of forensic powers of the highest order. His familiarity with the Common law, which he explored in the pages of Coke, the Year Books and the Law Reports, as well as the law relating to contracts and pleading, enabled him to win success. His acquaintance with equity practice did not begin until a later period, as the equity jurisdiction of the Courts of Massachusetts was at that time somewhat narrow and fragmentary. His studies in Constitutional law were profound. In a short time he removed from Northfield to Boston, as a more congenial field for the display of his talents. The extent and readiness of his attainments, his accuracy and logical methods soon made him prominent, and he greatly distinguished himself in the case of the slave child Med. It is somewhat singular that as counsel he contended in this case for exactly the opposite principle sustained by him so powerfully in his dissenting opinion in the Dred Scott case, maintaining that a citizen of a slave-holding State who comes to Massachusetts for the temporary purpose of business or pleasure and brings his slave as a personal attendant on his journey, may retain the slave for the purpose of carrying him out of Massachusetts and returning him to the domicile of the owner. At this time, however, the excitement upon the subject of slavery had not reached fever heat and the question could be discussed calmly without arousing an offended sense of morality by which slavery was to be regarded either as wicked in a court of law, or prohibited by the law of nations, or contrary to natural right. The decision, however, pronounced by Chief Justice Shaw, and concurred in by all the Judges, negatived the proposition maintained by Curtis, and held that the maxim

—the right of personal property follows the person of the owner—was to be limited strictly to those commodities that were everywhere and by all nations treated and deemed subjects of property; that the local laws which recognized property in slaves, while they might operate within their own jurisdiction so as to impart the incidents of property, could not operate *proprio vigore* outside of that jurisdiction; and that no rule of comity required a State to give to the laws of another State an operation within its territory which was inconsistent with its own public policy and legislation. His practice soon became extensive, both in the State and Federal courts, and he took some part, though not an active one, in public affairs, writing an article upon the “Repudiation of State Debts,” which was published in the *North American Review*. Upon the death of Judge Story Mr. Curtis was appointed to succeed him in the Corporation of Harvard College. Shortly after this the fugitive slave excitement broke out in Boston, and Mr. Curtis, although not a partisan, yet generally voting with the Whig Party, accepted the invitation to make an address of welcome to Mr. Webster, who had recently avowed his support and approval of a proposed Act of Congress,—one of the Compromise measures of 1850,—designed for the more effectual execution of the provision of the Constitution relating to the extradition of fugitive slaves.

The professional leadership of Mr. Curtis was so well established, that although the names of Judge Pitman, of the District Court of Rhode Island, and Judge Sprague of the District Court of Massachusetts, had been suggested to the President as suitable appointees, yet the appointment of Mr. Curtis gave universal satisfaction both to the Bar and the public. After ascending the bench, his first judicial utterance of importance was in *Cooley v. The Board of Port Wardens of the City of*



James A. Campbell

Philadelphia, in which he stated in new terms the doctrines of Constitutional law relating to the power of Congress to control foreign commerce and carried them to a greater height than had before been attained. The period of his judicial service was brief, and in popular recollection he will be chiefly remembered as the Judge who with Mr. Justice McLean most strongly dissented from the opinion of the majority of the Court in the *Dred Scott* case. His resignation from the Bench soon followed, taking place in 1857. The reasons which led to it were stated to be the insufficiency of his salary and his inability to support a large family upon his income; but the reader of the correspondence, which became somewhat embittered, between Chief Justice Taney and himself, in relation to an important change in the language and matter of the opinion of the Chief Justice, made after it had been delivered but before it had been filed, by which the Chief Justice inserted eighteen new pages in reply to the illustrations and objections urged by Judge Curtis in his dissenting opinion, will perceive the probable reason for his withdrawal from the Court.¹ He published two volumes of Reports of his decisions on Circuit, and a condensed edition of the decisions of the Supreme Court of the United States from its origin to 1854. He also delivered in 1872 to the students of the Harvard Law School a series of Lectures, which have been published under the title of "Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States." He was "the consummate master of forensic style among American lawyers of recent times. His clearness of thought and precision of statement were the delight not only of Bench and Bar, but even of

¹The reader can follow this correspondence in the "Life and Writings of B. R. Curtis," edited by his son, Benjamin R. Curtis, Vol. I, pp. 212-230, and Tyler's "Memoir of Roger B. Taney," Chap. V, p. 331 *et seq.*

the educated laity who would be drawn into the court-room for the mere pleasure of listening to him as he unfolded an argument. There the most intricate problems of law through his treatment of them became lucid. . . . His rhetoric both in form and manner was perfection of its kind, for as he stood up and addressed the court,—clear, calm, distinct and unimpassioned,—he seemed to the listener the ideal of a forensic, dialectical orator.”¹

The promotion of John Archibald Campbell to the bench was occasioned by the death of Mr. Justice McKinley in July, 1852. This great judge was commissioned upon the 22d of March, 1853. In less than eight years he also resigned. It will never cease to be a matter of professional regret that two such judges as Campbell and Curtis, having once attained such exalted stations, and having displayed such surpassing judicial powers, should have felt themselves called upon to retire from membership in a tribunal which they had greatly strengthened and adorned. In fact, had Campbell remained until the day of his death, his term of judicial service would have exceeded that of any man, Chief Justice or Associate, who had ever held a place upon that bench. It takes time to create a great judicial reputation, and the fruits of judicial wisdom ripen slowly. Had Marshall or Taney been stricken down in the midst of their careers, they would, as Chief Justices, be as little known to the country as Ellsworth and Chase. Or had Washington and Story resigned in middle life, their names would be as little remembered as those of Barbour and Woodbury. All of Chief Justice Marshall’s great Constitutional judgments, save two, were pronounced after he had been fifteen years upon the bench,

¹Life of Richard Henry Dana, by Charles Francis Adams, Vol. II, p. 139.

and the remarkable impression which Story made was after his judicial harness had become well worn. It is a matter of satisfaction, however, to record that the influence of Curtis and Campbell upon the bench which they quitted was not lost, as in after years no men appeared at the bar whose arguments made a profounder impression.

John Archibald Campbell was born in Washington, Wilkes County, Georgia, upon the 24th of June, 1811. His father was Duncan Greene Campbell, a descendant of emigrants from Scotland to the Colony of North Carolina. His grandfather served in the Continental line, became a Captain, and was attached to the personal staff of General Nathaniel Greene. Duncan G. Campbell removed to Georgia, was admitted to the bar, and married Mary Williamson, the youngest daughter of Lieut. Col. Williamson, of the Georgia regiment commanded by Col. Elijah Clark, which became famous in the annals of the war in the Southern department. The brigade of Pickens, the regiment of Clark, with Lee's Legion and the commands of Sumter, Shelby, Sevier and Francis Marion have been aptly termed the Rear Guard of the Revolutionary Army. Duncan G. Campbell is described in the "Recollections of an Old Lawyer," one of his associates, as the leader of his party in the State, of captivating address, courtly manners, and an orator withal. The County Campbell and town Campbellton were named after him. He was an enlightened statesman in the State of Georgia. He died in 1828.

His son, John A. Campbell, was educated at the University of Georgia. He entered college at the age of eleven years, and graduated in 1826, at the age of fifteen, with the first honors of his class. He was appointed by John C. Calhoun, then Secretary of War, as a cadet in the Military

Academy at West Point. He was admitted to the bar in March, 1830, at Montgomery, Alabama, having pursued his legal studies under John Clark, one of the Governors of Georgia, and John W. Campbell, his uncle, and during that year married Miss Goldthwaite, from Boston. He was successful in the profession, and in 1837 removed to Mobile, where he resided till his appointment as Associate Justice of the Supreme Court of the United States in March, 1853. In 1836 there were disturbances among the Indian tribes in Alabama, and some devastations committed by them. The blame rested, principally, upon speculators in lands and intruders. Large bodies of troops were collected from Georgia and Alabama, and mustered into the service of the United States, forming two Corps d'Armée. John A. Campbell was appointed Adjutant General of the second army of the South, being at the same time a member of the Legislature.

The judicial services of Mr. Justice Campbell were terminated abruptly by his resignation in 1861. He was the only Judge swept from the bench of the Supreme Court by the tide of secession. Before leaving the Bench he was a volunteer agent for the Confederate Government, and engaged in futile conferences with Secretary Seward to obtain the withdrawal of the United States troops from Fort Sumter. After departing from Washington he declined office under the Confederacy until August, 1862, when he became Assistant Secretary of War, and passed several years in this uncongenial service. "When I saw this highly endowed and eminently disinterested and patriotic man," said Henry S. Foote, "for many long and dreary months patiently and quietly performing the duties of a subordinate position in the War Department, at Richmond, under the supervision of men who, compared with him, were mere pigmies in intellect, I could not help men-

tally recurring to the noted case of Epaminondas, in the olden time, who was insultingly sentenced to sweep the streets of Thebes as a meet reward for public services which all the wealth and honors in the gift of his stupid and inappreciative countrymen would have been able but poorly and inadequately to requite." When the financial collapse of the Confederacy was manifest, in 1864, Campbell with others was sent to Hampton Roads, where they met President Lincoln and Secretary Seward, and conferred on the restoration of peace, but effected no arrangement. On the capture of Richmond, in April, 1865, Campbell remained as the sole representative of the Confederacy.

When he resumed his place at the bar of the Supreme Court of the United States, his arguments became as renowned as any ever delivered before that tribunal. In the New Orleans Water Works case and in the suits brought by the States of New York and New Hampshire against the State of Louisiana, he impressed himself most profoundly on the Court, while in the Slaughter House Cases it is said: "He seemed to have levied a contribution on the literature and learning of the world to enable him to show the intolerance of the Common law of monopolies, and to furnish authentic examples of the almost infinite devices by which the strong have, in all countries and in all ages, managed to destroy or curtail the right of every individual to exercise his faculties in any way that might seem good in his own eyes, saving, of course, the rights of others, as a basis for his powerful contention that while African slavery, as it had existed in the Southern States, was the occasion for the provision of the Constitution putting an end to slavery or involuntary servitude, the language of the Constitution had a scope far beyond the occasion that caused its use,

and applied to all attempts to frustrate the Heaven-descended right of every man to exercise his faculties in his own way." He was a profound and philosophical jurist, who gave vigor and breadth to his intellect by constantly resorting to the great sources of Roman law.

With the Court thus constituted, a vast amount of business was transacted of the most varied and interesting character. One noticeable feature is the remarkable increase in the number of patent causes, some of them relating to inventions of world-wide celebrity: Woodworth's Planing machine, Stimpson's Railroad invention, Goodyear's India-rubber, Elias Howe's Sewing-machine, Tatham's method of making tubes from lead, Burden's patent for nails and spikes, Winans' coal cars with drop-bottoms, the McCormick Reaper, and greatest of all, Morse's Electro-magnetic Telegraph, which has done more to bind in the bonds of Federal union the most distant States than even steam-boats, railroads, and newspapers. These cases gave rise to the most intricate and perplexing problems, not only of law, but of mechanics and science. All were dealt with by both Bench and Bar in a manner which awakens the most enthusiastic admiration over the intellectual vigor displayed, by which inventive genius was protected in its just rights from mistaken claims as to priorities and from fraudulent infringements, while the rights of assignees were stated in terms which enforced the sacred obligations of trust.¹

Closely allied with exclusive rights under patents was the

¹ *Stimpson et al. v. Wilson*, 4 Howard, 710 (1846). *Wilson v. Rousseau*, *Ibid.*, 647 (1846). *Wilson v. Simpson*, 9 Howard, 109 (1850). *Stimpson v. Baltimore and Susquehanna R. R. Co.*, 10 Howard, 329 (1850). *LeRoy et al. v. Tatham et al.*, 14 Howard, 156 (1852); 22 Howard, 132 (1859). *Troy Iron and Nail Factory v. Corning*, 14 Howard, 194 (1852). *O'Reilly v. Morse*, 15 Howard, 62 (1853). Opinion by Taney. *Corning v. Burden*, 15 Howard, 253 (1853). *Winans v. Denmead*, 15 Howard, 330 (1853). *Seymour v. McCormick*, 16 Howard, 480 (1853); 19 Howard, 96 (1856).

question of copyright, and although the Court declared that it would be difficult to assent to the proposition that an exclusive right either by Letters Patent or Copyright granted by the United States could be sold under the execution of a judgment of a State Court, yet they refused to pass directly upon the question; but they did hold that the right to print and publish a map which had been copyrighted did not pass to the purchaser at Sheriff's sale of the copper plate upon which it was printed.¹

Another feature is the discussion of French and Spanish grants under the Treaty of Paris ceding the territory of Louisiana, Spanish titles under the Florida cession, and Mexican grants in California, and kindred subjects, by which, in suits of ejectment and actions of trespass, conflicting rights were settled in regard to the quiet and peaceable possession of territories as immense as the imperial domain of the Cæsars, and richer than the mines of Golconda.²

The boundaries between the States of Missouri and Iowa, and between Florida and Georgia were established.³

In the controversy between the latter States, in a case where a bill had been filed by the State of Florida against the State of Georgia to establish the boundary lines, the Attorney-General of the United States moved to intervene in behalf of the United States. It was held that he might do so, and adduce evidence both written and parol, examine witnesses,

¹*Stevens v. Gladding*, 17 Howard, 447 (1854).

²*United States v. Reynes*, 9 Howard, 127 (1850). *LaRoche et al. v. The Lessee of Jones et al.*, *Ibid.*, 155 (1850). *United States v. Cities of Philadelphia and New Orleans*, 11 Howard, 610 (1850). *Montault v. United States*, 12 Howard, 47 (1851). *United States v. Hughes*, 13 Howard, 1 (1851). *United States v. Reading*, 18 Howard, 1 (1855).

³*State of Missouri v. Iowa*, and *Iowa v. Missouri*, 7 Howard, 660 (1849); 10 Howard, 1 (1850). *State of Florida v. State of Georgia*, 17 Howard, 478 (1854).

and be heard upon argument, without making the United States a party in the technical sense of the term. His right to do so was sustained by a majority of the Court, speaking through the Chief Justice; but Justices Curtis, McLean, Campbell and Daniel strongly dissented. Chief Justice Taney in the course of his opinion said:

"The case then is this: Here is a suit between two States in relation to the true position of the boundary line which divides them, but there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the Court. For their interests may be different from those of either of the litigating States, and it would hardly become this tribunal, entrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceedings, to do injustice rather than depart from English precedents. A suit in a Court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country."

Several important cases arose in which the powers of the States were considered. The taxing power of the States was upheld, the Court announcing that such a power, which was an attribute of sovereignty, should never be presumed to be relinquished unless the intention is declared in clear and unambiguous terms.¹ The right of the States to direct a re-hearing of cases decided in their own Courts was upheld. The only limit upon their power to pass retrospective laws, said the Court, is that which grows out of the prohibition by the Constitution of the United States of the passage of *ex post facto* laws, *i.e.*, retrospective penal laws; but laws merely divesting antecedent vested rights of property, where there was no contract, are not inconsistent with the Constitution of the

¹Phila. and Wilmington R. R. Co. v. State of Maryland, 10 Howard, 376 (1850).

United States.¹ So too, a revocation by a State legislature of a grant of ferry rights to a town was upheld, the subject matter of the grant, and the character of the parties to it, both showing that such a grant was not a contract beyond legislative interference.² So, too, where the State of Illinois saw fit to provide a statutory punishment for the offence of harboring fugitive slaves, it was held that the State in the exercise of its police powers might repel from its borders an unacceptable population, paupers, criminals, fugitives or slaves, and to punish those of her citizens who endeavored to thwart this policy by assisting the fugitives, and it was no objection to this legislation that the offender might be liable to punishment under an act of Congress for the same offence.³ From this judgment Mr. Justice McLean strongly dissented on the ground that it was contrary to the nature and genius of our government to punish an individual twice for the same offence, and where jurisdiction had been clearly vested in the Federal Government, and Congress had acted, no State could punish the same act.

And in *Smith v. The State of Maryland*,⁴ it was held that a State law forbidding the taking of oysters with a scoop was Constitutional, and that a vessel with a license from the United States might be forfeited under such a law, inasmuch as the State had a right to preserve the public right of fishery. Mr. Justice Curtis, in delivering the opinion of the Court, declared that the purpose of the law was to protect the

¹ *Baltimore and Susquehanna R. R. Co. v. Nesbit et al.*, 10 Howard, 395 (1850).

² *Town of East Hartford v. Hartford Bridge Co.*, 10 Howard, 511 (1850).

³ *Moore v. People of the State of Illinois*, 14 Howard, 13 (1852). This was in conformity with the decision in *Fox v. State of Ohio*, 5 Howard, 410 (1847).

⁴ 18 Howard, 71 (1855). This was in confirmation of *Martin v. Waddell*, 16 Peters, 367 (1842), and *Den ex demise Russell v. The Jersey Company*, 15 Howard, 426 (1853).

growth of oysters in the waters of the State by prohibiting the use of particular instruments in dredging for them; that the soil below low-water mark was the subject of exclusive proprietary right and ownership, and belonged to the State on whose maritime border and within whose territory it lay, and that this soil was held by the State not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which was the common liberty of taking fish, as well shell-fish as floating fish.

But when a State imposed a tax upon passengers over the Cumberland Road, or a gross sum upon coaches carrying the United States mail, it was held to be a tax upon the United States, and in violation of the compact between the State and the United States.¹

The extent and true meaning of grants to corporations were solemnly adjudicated, and attempts made by them to transcend their lawful powers were rebuked, all ambiguities in charters being resolved in favor of the public. An effort of a canal company, claiming under grants from three States, to collect tolls from passengers passing through the canals, or from vessels on account of the passengers on board, was restricted to tolls upon commodities.²

Corporations were subjected by taxation to their just share of the burdens of public expense.³ And an effort to restrain one railroad company from crossing another at right angles was frustrated, and it was held that such crossing did not impair the obligation of the contract contained in the charter of the objecting company.⁴

¹*Achison v. Huddleson*, 12 Howard, 293 (1851).

²*Perrine v. Chesapeake & Delaware Canal Co.*, 9 Howard, 172 (1850).

³*Philadelphia & Wilmington R. R. Co. v. State of Maryland*, 10 Howard, 376 (1850).

⁴*Richmond &c. Railroad Co. v. Louisa R. R. Co.*, 13 Howard, 71 (1851).

The scope and limits of Federal appellate jurisdiction were still more definitely settled, and litigants instructed in the oft-repeated lesson that where the decision of a State Court was in favor of the plaintiff's right claimed under an act of Congress, or where it was a State statute that had been construed, no writ of error would lie.¹ But the jurisdiction was upheld where a State Court had decided that a title acquired under a deed was better than one acquired under the judgment of a United States Court.² And although laws passed in Texas before her admission as a State could not be examined on a plea that they were in conflict with the Constitution of the United States,³ the same point being ruled in *Kennett v. Chambers*,⁴ yet where a Territorial Court had rendered judgment, and the record was certified to the Supreme Court of the United States *after* the admission of the Territory into the Union, the subject matter would and could be reviewed in the Supreme Court of the United States.⁵

The principles of commercial law were examined and applied in a multitude of instances, notably in cases of insurance and of promissory notes, and it was held that where the contract grew out of a correspondence, the deposit of a letter in the mail accepting the terms of an offer completed the contract.⁶

A number of cases of a miscellaneous character were considered, which show the range and variety of subjects discussed. The far-famed rule in *Shelly's* case was considered

¹*Trustees of the Bank of Cincinnati v. Baldwin*, 9 Howard, 261 (1850).

²*Clements v. Berry*, 11 Howard, 398 (1850).

³*League v. De Young*, 11 Howard, 185 (1850).

⁴14 Howard, 38 (1852).

⁵*Webster v. Reid*, 11 Howard, 437 (1850).

⁶*Tayloe v. Merchants' Insurance Co. of Baltimore*, 9 Howard, 390 (1850).

in *Webster v. Cooper*.¹ The liability of a Railroad Company for negligence in injuring a stockholder, while riding free at the President's invitation, was enforced.² The City of Providence was held liable for a breach of municipal duty in not maintaining her sidewalks safe from snow;³ while General Kosciusko's wills were interpreted in *Ennis et al. v. Smith*.⁴ Duties upon imports and the proper interpretation of the Acts of Congress relating thereto, were considered in a case which involved the appraisement of the amount of quinine contained in Peruvian bark.⁵

In discussing the question of the citizenship of corporations, in the case of *Marshall v. The Baltimore & Ohio Railroad Co.*,⁶ the Court upheld sound principles of morality by avoiding contracts to obtain legislation through the employment of secret agents, who were to be paid if successful, on the ground that such contracts were against public policy.

In administering the principles of general equity jurisprudence, which it was insisted must be uniform throughout the United States, it was held that the decisions of State courts, when not depending upon local law or usage, were not binding upon the United States Courts.⁷

In re Thomas Kaine,⁸ an alleged fugitive from Great Britain, a question of extradition, arising under the tenth article of the Treaty of 1842 between the United States and Great Britain, was considered. A warrant had been issued by

¹ 14 Howard, 488 (1852).

² *Philadelphia & Reading Railroad Co. v. Derby*, 14 Howard, 468 (1852).

³ *City of Providence v. Clapp*, 17 Howard, 161 (1854).

⁴ 14 Howard, 400 (1852).

⁵ *Bartlett v. Kane*, 16 Howard, 263 (1853). *U. S. v. Sixty-seven Packages of Dry Goods*, 17 Howard, 85 (1854). *U. S. v. Nine Cases of Silk Hats*, *Ibid.*, 97 (1854).

⁶ 16 Howard, 314 (1853).

⁷ *Neves et al. v. Scott et al.*, 13 Howard, 268 (1851).

⁸ 14 Howard, 103 (1852).

a United States Commissioner at the instance of the British Consul for the apprehension of a person, who it was alleged had committed an assault with attempt to murder in Ireland. Kaine having been committed for the purpose of abiding the order of the President of the United States, applied for a *habeas corpus*, which was issued by the Circuit Court of the United States, and after a hearing, the writ was dismissed, and the prisoner remanded to custody. The opinion of the Court refusing the motion for the writ was delivered by Mr. Justice Catron, in which Justices McLean, Wayne and Grier concurred. Justice Curtis delivered a separate opinion, which was dissented from by the Chief Justice, and Justices Daniel and Nelson, all of whom believed that the writ should issue in order to bring up the prisoner with a view to his discharge, on the ground that the judiciary possessed no jurisdiction to entertain the proceedings under the treaty, without a previous requisition made under the authority of the English Crown upon the President: and on the further ground that the United States Commissioner was not an officer within the terms of the Treaty upon whom the power had been conferred to hear and determine the question of criminality upon which the surrender was made.

The greatest and most prominent of all the discussions at this period, however, were those which turned upon the meaning of the "Commerce Clause" in the Constitution, and two cases arose which are among the most celebrated in the annals of our jurisprudence: *The Wheeling Bridge* case and the case of *Cooley v. The Board of Wardens of the Port of Philadelphia*.

The former came before the Court upon several occasions,¹

¹ *State of Pennsylvania v. The Wheeling & Belmont Bridge Co. et al.*, 9 Howard, 647 (1850); 13 Howard, 518 (1851); 18 Howard, 421 (1855).

and was argued by Mr. Edwin M. Stanton, in behalf of the State of Pennsylvania, and Mr. Reverdy Johnson, in behalf of the Bridge Company, with a degree of ability and learning worthy of the palmiest days of the old Bar of the Supreme Court. In fact, the argument of Mr. Stanton touched the profoundest depths of the question, and rose to the loftiest heights of eloquence. It was contended that the Ohio River was a highway of commerce leading to and from the ports of Pennsylvania, regulated by Congress, which had been unlawfully obstructed by the bridge across the river at the city of Wheeling, built under the authority of the State of Virginia, without a draw, to the injury of the State of Pennsylvania, and that, therefore, the bridge ought to be abated as a nuisance by decree of the Court in the exercise of its original jurisdiction, a State being party plaintiff. The opinion was delivered by Mr. Justice McLean, sustaining this contention, and putting the Bridge Company upon terms either to elevate its structure, build a draw, or to remove it entirely. From this judgment Chief Justice Taney dissented, together with Mr. Justice Daniel, upon the ground that it was doubtful whether the bridge was a public nuisance, or whether the Court had jurisdiction to decree its abatement. Before the decree of the Court could be executed, an Act of Congress was passed, by which the bridge constructed by the company was declared to be a lawful structure in its then condition, and was also declared to be a post-road for the passage of the mail of the United States. Subsequently the main bridge was blown down in a gale of wind, and the Company was making preparations to rebuild it when a bill was filed, praying for an injunction. It was held that Congress, under its power to regulate commerce, might supersede the decree of the Supreme Court founded upon public right, and that such

an act was not in conflict with the Consitution. Although Congress could not annul a judgment of the Court upon the private rights of the parties, it could annul one founded on the unlawful interference with the enjoyment of a public right, that being entirely under the control of the national legislature. The opinion of the Court upon the latter application was delivered by Mr. Justice Nelson, concurred in by Justices Wayne, Grier and Curtis, Mr. Justice McLean dissenting. Mr. Justice Daniel, while concurring in the decision of the Court, dissented from the reasons expressed.

In the case of *Cooley v. The Board of Wardens of the Port of Philadelphia*,¹ a law of the State of Pennsylvania for the regulation of pilots and pilotage was held to be Constitutional, Judge Curtis declaring that the terms of the act, which provided that a vessel neglecting or refusing to take a pilot shall forfeit and pay to the Master Wardens of the Pilots for the Society for the Relief of Distressed and Decayed Pilots, constituted an appropriate part of a general system of regulations on the subject of pilotage, and did not conflict with the Article of the Constitution prohibiting States from imposing imposts and duties on imports, exports and tonnage, inasmuch as these subjects were distinct from fees and charges for pilotage and from the penalties by which commercial States enforced their pilot laws. In considering whether the law in question was repugnant to the clause vesting in Congress the power to regulate commerce, he said:

“That the power to regulate commerce includes the regulation of navigation we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensation bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to

¹ 12 Howard, 299 (1851).

the conclusion that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution. . . . How, then, can we say that by the mere grant of power to regulate commerce the States are deprived of all the power to legislate on this subject, because, from the nature of the power, the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is, in any case, something different from the nature of the subject to which in such case the power extends, and that the nature of the power necessarily demands in all cases exclusive legislation by Congress, while the nature of one of the subjects of that power not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States in conformity with the circumstances of the ports within their limits. . . . It is the opinion of a majority of the Court that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States."

From this reasoning Justices McLean and Wayne dissented, and Mr. Justice Daniel, although concurring in the judgment of the Court, dissented from its reasoning.

After considering the rules governing navigation upon the river Ohio, in certain cases of collision and jettison,¹ the Court made a lasting contribution to the jurisprudence of the country in the extension of the national admiralty and maritime jurisdiction, in the case of the *Propeller Genesee Chief et al. v. Fitzhugh et al.*²

¹ *Williamson et al. v. Barrett*, 13 Howard, 101 (1851). *Lawrence v. Minturn*, 17 Howard, 100 (1854).

² 12 Howard, 443 (1851).

An Act of Congress passed on the 26th of February, 1845, had extended the jurisdiction of the District Courts to certain cases upon the Great Lakes and navigable waters connecting the same, and it was held in a memorable opinion by Chief Justice Taney that this act was Constitutional.

"These lakes," said he, "are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the General Government on the Atlantic Seas applies with equal force to the lakes. There is equal necessity for an instance and for a prize power of the Admiralty Court to administer international law, and if the one cannot be established, neither can the other. . . . The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and in this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide. Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, or anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States and nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

From this judgment Mr. Justice Daniel dissented, as he had always done upon every notable extension of the admiralty jurisdiction, and in an opinion delivered by Mr. Justice Wayne in *Fretz et al. v. Bull et al.*,¹ it was held in expansion of the doctrine of *Waring v. Clarke*,² that the admiralty

¹ 12 Howard, 466 (1851).

² 5 Howard, 441 (1847).

jurisdiction of the United States extended to collisions on the Mississippi River above tide-waters. From this decision Mr. Justice Daniel again dissented.

It was from the consideration of questions such as these that the Court glided at a single turn to the brink of a fearful precipice. No monitory shuddering warned them of impending ruin. The broad current of decision and of argument flowed on as usual, unbroken by hidden obstructions or whirling eddies, as smooth as the glassy surface of a descending stream upon the very edge of its fall. In a moment they became involved. The wild passions of the Kansas-Nebraska struggle had reached the Court. The agony of conflict between slavery and freedom, which touched the tongue of Phillips with fire and raised the soul of Sumner to the stars, had wrapped them in its frenzy, and in a moment of bewilderment they believed that they had the judicial power to deal with a political and moral question, and by a judgment, which they vainly endeavored to induce the country to believe was not extra-judicial, to settle the most agitated question of the day. The judgment was pronounced, but was promptly reversed by the dread tribunal of War.

At the December Term, in the year 1856, the case of *Dred Scott, Plaintiff in error, v. John F. A. Sandford* stood for a second argument, on two questions stated by an order of the Court to be argued at the bar. The first question was whether Congress had Constitutional authority to exclude slavery from the Territories of the United States, or in other words whether the Missouri Compromise Act, which excluded slavery from the whole of the Louisiana Territory, north of the parallel 36° 30' was a Constitutionally valid law. The second question was whether a free negro of African descent, whose ancestors were imported into this country and sold as

slaves, could be a citizen of the United States, under the Judiciary Act, and as a citizen could sue in the Circuit Court of the United States.¹

The action had been brought by Scott in the Circuit Court of the United States for the District of Missouri, to establish the freedom of himself, his wife and their two children. In order to give the Court jurisdiction of the case, he described himself as a citizen of the State of Missouri, and the defendant, who was the administrator of his reputed master, as a citizen of the State of New York. A plea to the jurisdiction was filed, alleging that the plaintiff was not a citizen of Missouri, because he was a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves. To this plea there was a general demurrer, which was sustained by the Court and the defendant was ordered to answer over. A plea to the merits was then entered, to the effect that the plaintiff and his wife and children were negro slaves, the property of the defendant. The case went to trial, and the jury, under an instruction from the Court upon the facts of the case that the law was with the defendant, found a verdict against the plaintiff, upon which judgment was entered, and the case was then brought upon exceptions by writ of error to the Supreme Court of the United States.

It is clear that the first question raised by the record arose under the plea to the jurisdiction of the Circuit Court, and after a careful study of the opinions and dissenting opinions, it is equally clear that if it had been decided by the Supreme Court that Scott was not a citizen by reason of his

¹ In stating these questions, I have followed the language of Mr. George Ticknor Curtis, one of the counsel who argued the case, whose full and accurate knowledge of the inside history of the case exceeds that of any other man living.

African descent, the only thing that could be properly done would be to direct the Circuit Court to dismiss the case for want of jurisdiction, without looking to the question raised by the plea to the merits. But if the Court should decide that he was a citizen notwithstanding his African descent, then the question raised by the plea to the merits, relating to his personal status as affected by his residence in a free territory and his return to Missouri, would have to be acted upon. This latter question involved the Constitutional power of Congress to prohibit slavery in that part of the Louisiana territory purchased by the United States from France, and also the collateral question as to the effect to be given to a residence in the free State of Illinois, and a subsequent return to Missouri. Upon an action brought in the State Court many years prior, the Supreme Court of Missouri had held Scott to be still a slave, upon the broad ground that no law of any other State or Territory could operate in Missouri upon personal status, even if he did become an inhabitant of such other State or Territory.

The case was first argued before the Supreme Court of the United States at the December Term of 1855, and it was found, after consideration and comparison of views, that it was not necessary to decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of the merits. Mr. Justice Nelson was assigned to write the opinion of the Court upon this view of the case, from which, however, Justices McLean and Curtis dissented. The opinion prepared by Nelson, judging from its internal evidence, as well as the history of it given by him,¹ was designed to be delivered as the opinion of

¹ See letter of Mr. Justice Nelson to Mr. Tyler, in Tyler's "Memoir of Taney," Chap. V, p. 385.

the majority of the Bench, and in disposing of the plea to the jurisdiction, he said: "In the view which we have taken of the case, it will not be necessary to pass upon this question, and we shall, therefore, proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is whether or not the removal of the plaintiff, who was a slave, with his master from the State of Missouri to the State of Illinois with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works emancipation." The opinion then disposed of the case upon the ground that the highest Court in the State of Missouri had decided that the original condition of Scott had not changed and that this was a question of the law of Missouri, on which the Supreme Court of the United States should follow the law as it had been laid down by the highest tribunal of the State. The conclusion reached by the opinion was not that the case should be dismissed for want of jurisdiction, but that the judgment of the Circuit Court which had held Scott to be still a slave should be affirmed. Shortly after this, however, a motion was made by Mr. Justice Wayne, in a conference of the Court, for a re-argument of the case, and the two questions, which we have stated at the outset of our discussion of the matter, were carefully framed by the Chief Justice to be argued at the bar *de novo*. The cause was argued by Montgomery Blair and George Ticknor Curtis, in behalf of the plaintiff in error, and Reverdy Johnson and Senator Geyer, of Missouri, for the slave-owner.

At the second argument Mr. Justice Wayne became fully convinced that it was practicable for the Supreme Court of the United States to quiet all agitation on the question of slavery in the Territories by affirming that Congress had

no Constitutional power to prohibit its introduction, and, unfortunately for himself, his associates, and the country, persuaded the Chief Justice, and Justices Grier and Catron of the public expediency of this course. The opinion of the Court was then pronounced by Chief Justice Taney,¹ in which Mr. Justice Wayne absolutely concurred. Mr. Justice Nelson read his own opinion, which had been previously prepared as that of the Court. Mr. Justice Grier concurred in Nelson's opinion, and was of opinion also that the Act of 6th March, 1820, known as the "Missouri Compromise," was unconstitutional and void, as stated by the Chief Justice. Justices Daniel and Campbell concurred generally with the Chief Justice, while Mr. Justice Catron thought that the judgment upon the plea in abatement was not open to examination in this Court, and concurred generally with the Chief Justice upon the other points involved. Justices McLean and Curtis alone dissented, the former stating that the judgment given by the Circuit Court on the plea in abatement was final. He was also of opinion that a free negro was a citizen, and that the Constitution justified the Act of Congress in prohibiting slavery, and further that the judgment of the Supreme Court of Missouri pronouncing Scott to be a slave was illegal, and of no authority in the Federal Court.

Without entering into technical niceties, it is perhaps sufficient to say that the general judgment of the profession, entirely irrespective of the political questions involved, is to the effect that the Court after holding, upon consideration of the plea in abatement, that Dred Scott was not a citizen of the United States, and that therefore the Circuit Court had no jurisdiction, ought to have dismissed the case, without

¹The exact date, March 6th, 1857, is perhaps noteworthy, being just two days after the inauguration of James Buchanan as President.

entering upon the consideration of the second question involved, and that in doing so they transcended the proper bounds of judicial authority, and indulged in mere *obiter dicta* of no legal validity or conclusiveness. Although an elaborate effort was made by Mr. Reverdy Johnson, in a letter written to a public meeting in Baltimore, in relation to the manner of Chief Justice Taney in handling the case, to justify the action of the majority of the Court, yet it is clear that Mr. Johnson's argument vanishes into thin air, as soon as it is remembered that every word written and read by Justices McLean and Curtis was written and read as their dissent from the opinion of the Chief Justice, which they had heard read in conference, and in which the doctrine was elaborately maintained that Congress had no Constitutional power to exclude slavery from any Territory of the United States. The propriety with which any member of the Bench could touch this question—the test of whether his views were judicial or extra-judicial—depended simply and solely upon his view that the Circuit Court had or did not have jurisdiction on the facts averred in the plea to the jurisdiction.¹

No portion of Chief Justice Taney's opinion is more labored or constrained than the effort to show that, after disposing of the plea in abatement, which, when sustained as it had been upon demurrer, ousted the jurisdiction of the Court, the Court had still a right to enter upon a discussion of the merits of the case.² And no part of the dissenting opinion of Mr. Justice Curtis is more powerful, from a legal point of view, than his consideration of the doctrines of pleading involved, and fairly arising out of the state of the record.³

¹ George Ticknor Curtis, "Memoir of Benj. Robbins Curtis," Vol. I, p. 238.

² See opinion of Chief Justice Taney in *Dred Scott v. Sandford*, 19 Howard, 393 (1856).

³ See dissenting opinion of Mr. Justice Curtis, *Ibid.*, 564.

The Chief Justice used the following language, after having shown historically that at the time of the adoption of the Constitution of the United States free negroes were not citizens: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race."

The injustice which has been done to Chief Justice Taney consists in the partisan use which was made of the single phrase, "That they had no rights which the white man was bound to respect." The words were violently torn from the context of the opinion, and quoted as though the Chief Justice had intended to express his own individual views upon the question, naturally arousing a storm of indignation at their inhumanity and barbarity. That such were not the personal views of the Chief Justice, no careful or conscientious student of his life can for a moment suppose. He had long before manumitted all his own slaves, had never refused his professional aid to negroes seeking the rights of freedom; had even defended a person indicted for inciting slaves to insurrection, at a time when the community were violently excited against the offender and against Taney himself for his defense, and, when pressed with the gravest business, had been known to stop in the streets of Washington to help a negro child home with a pail of water. He was moreover a man of the greatest kindness, charity and sympathy. The real wrong-

doing of which the Chief Justice was guilty was in attempting by extra-judicial utterances to enter upon the settlement of questions purely political, which were beyond the pale of judicial authority, and which no prudent judge would have undertaken to discuss. It was a blunder worse than a crime, from the consequence of which he and his associates can never escape.

So far as his historical illustrations were concerned, they were fully met by the dissenting opinion of Mr. Justice Curtis, who showed by decisions of the Supreme Court of North Carolina that free colored persons born within the State were citizens of that State, and by logic, were therefore, citizens of the United States. It was all idle, as an eminent lawyer and statesman has observed, himself of the same political faith as the Chief Justice,¹ to argue that in the earliest English days there were slaves who had no rights; that if a stranger slew one, his lord recovered the damage, or if his master killed him, he was but a chattel the less; that serfs were goods, and that the Judges of the time of Charles II had united in declaring negroes to be merchandise liable to forfeiture, and that years after our independence they were treated in British statutes as merchandise, with rum and iron, and that slavery existed and had been recognized by the laws of every State when the Constitution was formed. There was a higher law between the parties, and no general agreement could prevail against natural right. Nor was it possible to believe that when the Fathers of the Republic said all men were free and equal, they meant only white men, and even if they did, they had no power to bind their descendants forever to a doctrine so unjust. And this view is concurred in by a gentleman of the highest professional distinction,

¹ See Annual Address by Clarkson N. Potter before the American Bar Association, 1881, "Fourth Annual Report of Amer. Bar Assn.," p. 196.

himself a lifelong member of the party of Chief Justice Taney, in a recent exhaustive study of the decisions of the Chief Justice, in which he states that although the opinion displays great ingenuity and knowledge of the political history of the country, yet it seems to him that the Chief Justice, in an anxious endeavor to carry out the views so often expressed by him as to the right of the individual States to deal exclusively with the subject of this domestic relation, had been carried far beyond the proper limitations within which it should have been confined.¹ Dr. Von Holst pronounces the decision a political enormity, based upon the fact that the decision went beyond the record, and that the Chief Justice and the concurring Associates indulged in the most palpable sophisms upon the extent of their appellate jurisdiction, confounding the method of procedure upon writs of error from the judgments of State Courts, with that which ought to prevail when the judgment of a United States Circuit Court was brought up, and it appeared in the record that the lower court had no jurisdiction.²

It is not necessary to consider the political aspect of the case, nor to answer, as has been elaborately done, the assault made by Mr. Seward in the Senate of the United States upon the Supreme Court, in which he distinctly hinted that a corrupt political bargain had been made between the Chief Justice and President Buchanan at the time of his inauguration.³

¹ See "Constitutional Development in the United States as Influenced by Chief Justice Taney," by Geo. W. Biddle, Esq., of Philada., published in "Constitutional History of the United States as seen in the Development of American Law."

² Von Holst's "Constitutional and Political History of the United States from 1856 to 1859," Vol. V, p. 23-46.

³ A striking and concise analysis of the Dred Scott case was made by Governor John A. Andrews in a speech to the Massachusetts Legislature delivered in 1858, reprinted in "The Nation" of April 14th, 1892.

Nor is it necessary to consider whether authoritative proof can be produced in support of Mr. Ashley's contention, which has been adopted by Dr. Von Holst, that a systematic effort had been made by the slave-holders to secure a preponderating position of influence in the Supreme Court of the United States in order to secure the judgment. The high character of the Justices, and the length of time that they had held their offices would refute any such statement. Although bitter partisans might assume that some such deep laid plot had been successfully carried out, yet no one who temperately and calmly considers the facts as developed from the decisions of the Supreme Court itself, and the correspondence of the day, can arrive at such a conclusion, although he cannot fail to lament that in yielding to a fatal delusion Mr. Justice Wayne, in a moment of infatuation, became convinced that the Court could settle political and moral questions for all time, and that too on the wrong side, and thus did more to undermine the influence of this great tribunal, and prostrate the personal influence of its members, as well as blacken their record, than can be predicated of any other cause to be found in the length and breadth of our judicial history.¹

In less than two years after the decision in the Dred Scott case had been pronounced the State of Wisconsin arrayed herself in an attitude of defiance to a solemn judgment of the Supreme Court of the United States, and Chief Justice Taney must have recalled the similar experience of Chief Justice Marshall, when his judgment in the Cherokee case

¹ Mr. Bryce, in his work on "The American Commonwealth," Vol. I, ch. 24, speaks of the Dred Scott case, which, in a moment of weakness, induced the Court to overstep the legitimate bounds of its authority, as one of the misfortunes to be ranked with the interposition of the Court in the Presidential Electoral count dispute of 1877, and the reversal of its earlier decisions upon the legality of legal tender notes.

had been scoffed at by the State of Georgia. An effort had been made to enforce the provisions of the Fugitive Slave Law, and the Supreme Court of Wisconsin pronounced the Act unconstitutional and void, and resisted to the utmost its administration and enforcement by the Federal authorities. The question arose in the case of *Ableman v. Booth*.¹ In delivering the opinion of the Court, the case being argued by Attorney-General Jeremiah S. Black, for the plaintiffs in error, but no counsel appearing upon the other side, Chief Justice Taney declared that it appeared that a Judge of the Supreme Court of Wisconsin had claimed and exercised the right to supervise and annul the proceedings of a Commissioner of the United States, and to discharge a prisoner who had been committed for an offence against the laws of the Federal Government, and that this exercise of power had been afterwards sanctioned and affirmed by the Supreme Court of the State; that the State Court had gone even farther, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding of *habeas corpus*, had set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment; and that it further appeared that the State Court had not only claimed and exercised this jurisdiction, but had also decided that their decision was final and conclusive upon all the Courts of the United States, and had ordered their clerk to disregard and refuse obedience to the writ of error issued by the Supreme Court pursuant to the Act of Congress of 1789, to bring up for examination and revision the judgment of a State Court. He said:

¹ 21 Howard, 506 (1858).

"These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State Courts over the Courts of the United States in cases arising under the Constitution and laws of the United States is now, for the first time, asserted and acted upon in the Supreme Court of a State. . . . It would seem to be hardly necessary to do more than to state the result to which this decision of the State Court must inevitably lead. It is of itself a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the Union of the States, could have lasted a single year, or fulfilled the high trust committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found."

He then proceeds, by a course of unanswerable logic, to demonstrate that such a claim would result in the most disastrous consequences, and that it would lead, if persisted in, to a complete destruction of the harmony and peace of the Union. After pointing out that it was evident, under our system, that the Constitution, as the fundamental and supreme law, had vested in the Supreme Court the power of final settlement of all such questions, he reasons thus with the State authorities:

"Nor is there anything in this supremacy of the General Government or the jurisdiction of its judicial tribunals to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice from one another; and their anxiety to preserve it in full force in all its powers, and to guard against resistance to, or evasion of its authority on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all Executive and Judicial officers of

the several States (as well as those of the General Government), shall be bound by oath or affirmation to support this Constitution. . . . Now it certainly can be no humiliation to a citizen of a Republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it; nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith, and certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States, to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes."

The judgment of the Supreme Court of Wisconsin was, therefore, reversed.

But few other cases of importance occurred before the actual outbreak of the Civil War. In the case of the *Commonwealth of Kentucky v. Dennison*,¹ the Chief Justice maintained the following propositions: That in a suit between two States, the Supreme Court had original jurisdiction without further Acts of Congress regulating the mode in which it shall be exercised, and that suit by or against the Governor of a State in his official capacity is a suit by or against the State. This was in conflict with the doctrine so elaborately expressed and argued for the first time with so much ability by Mr. Justice Iredell in his dissenting opinion in the famous case of *Chisholm's Exrs. v. The State of Georgia*,² but with an appreciation of the difficulty that might exist in enforcing a decree entered against a recalcitrant State, the Chief Justice, in tones which have been referred to as pathetic, declared that if the Governor refused to discharge his duty there was no power dele-

¹ 24 Howard, 66 (1860).

² 2 Dallas, 419 (1793)

gated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him.

Truly it seemed as if the Chief Justice, at the end of his long career, had entered a cloud, and found his authority contested at every turn; for in the famous Merryman case,¹ which involved the right of the President or his delegate to suspend the writ of *habeas corpus*, he found himself unable to enforce his authority, where a citizen of Baltimore had been arrested by a military force acting under the orders of a Major General of the United States Army, commanding in the State of Pennsylvania, and had been committed to the custody of the General commanding Fort McHenry, then a part of the military district of Maryland. Upon an application for a writ of *habeas corpus*, the Chief Justice, sitting at chambers, directed the commandant at the Fort to produce the body of the petitioner upon the next day. This was promptly declined, on the ground that the prisoner had been arrested upon a charge of treason, and was "publicly associated with, and holding a commission as Lieutenant in a company, having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the Government, and also because the officer having the petitioner in custody was duly authorized by the President of the United States in such cases to suspend the writ of *habeas corpus* for the public safety." The Chief Justice in a most elaborate opinion upon the law relating to the writ of *habeas corpus* held these reasons to be insufficient, and that the petitioner was entitled to be set at liberty. He found himself unable, however, to enforce his decree.²

¹ 1 Campbell, 246 (1868).

² This case led to a most earnest controversy among eminent jurists all over the country in relation to the power of the President to suspend the writ of

In reviewing the decisions delivered by the Supreme Court during the Chief Justiceship of Mr. Taney, it is clear that the doctrines announced by the Court are characterized by a much closer adherence to the language of the Constitution than had been common in the days of Marshall, and that as a whole the authority of the States had been extended and supported, upon numerous occasions, in a manner which qualified, if it did not restrict, the principles announced by the great Chief Justice. The theories of the Constitution entertained by Marshall and Taney were those of their respective parties, and are irreconcilable. Without imputing to either a desire to extend unnecessarily or immoderately the doctrines of their schools, it can be safely asserted that although partisan politics should have no place upon the Bench, yet it is impossible to expect men to divest themselves of certain fundamental views in relation to the nature of our government simply because they have ascended the Bench and thrown aside the contentions of the political arena.¹ In later years a general recurrence to the doctrines of Marshall became unavoidable, and the tendency has been steadily in the direction of the proper logical development of his principles, which have proved themselves to be the safeguards of national institutions and the life of national authority. At the same time a debt of gratitude is due to those

habeas corpus, the affirmative being sustained by such eminent jurists as Horace Binney, of Philadelphia, and Chief Justice Parker, of Massachusetts; while the contrary was maintained by Benjamin R. Curtis and a host of less distinguished writers, whose pamphlets constitute an interesting chapter in Constitutional law. The action of the President was sustained by public opinion arising out of the extreme peril of the situation, and the fact that armed treason had taken the field against the Federal authorities.

¹ An interesting paper, entitled "Partisanship in the Supreme Court," is to be found in the *North American Review*, Vol. CXXXII, 176, written by United States Senator John T. Morgan.

Judges who refused to prostrate the rights of the States, and to carry to violent extremes, doctrines which, if pressed beyond their proper and legitimate sphere, would result in absolute centralization and the destruction of the autonomy of the States.

NOTE.

The following interesting facts, showing the increase of the business of the Court, are stated by Mr. Justice Strong:

In 1801, when John Marshall was appointed Chief Justice of that Court, the number of cases brought into it for adjudication was only ten. The entire number during the five next following years, including both writs of error and appeals, was only one hundred and twenty, or an average of twenty-four for each year. Thenceforward the business of the Court increased slowly, until, in the period between 1826 and 1830, the aggregate number of cases brought into it was two hundred and eighty-nine—the average being about fifty-eight a year. In 1836, when Roger B. Taney succeeded Marshall as Chief Justice, the number was only thirty-seven. From 1830 to 1850, the increase was also very gradual. Within the five years ending with 1850, the number of cases brought into the Court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one each year. The Court was then able to dispose of its entire docket during a session of three months. But, since the year 1850, the increase has been much more rapid. Within the five years ending with 1880, the number of new cases has been nineteen hundred and fifty-three, averaging more than three hundred and ninety-one each year. This exhibits, certainly, a very remarkable increase, serious in its consequences.—“The Needs of the Supreme Court,” *North American Review* for May, 1881, Vol. CXXXII, 437.

CHAPTER XVII.

SIXTH EPOCH: 1861 to 1870: OUTBREAK OF THE CIVIL WAR: CHARACTER OF CASES BEFORE THE COURT: CALIFORNIA LAND CLAIMS: MEXICAN, SPANISH AND FRENCH TITLES: THE PRIZE CASES: RIGHTS AND LIABILITIES OF NEUTRALS AND BELLIGERENTS: A NATIONAL CRISIS: VALUE OF THE PRINCIPLES ESTABLISHED BY MARSHALL, AS SHOWN IN THE TAX CASES: DEATH OF TANEY: APPOINTMENT OF SALMON P. CHASE AS HIS SUCCESSOR; SKETCHES OF CHIEF JUSTICE CHASE AND OF ASSOCIATE JUSTICES CLIFFORD, SWAYNE, MILLER, DAVIS AND FIELD: CASES GROWING OUT OF A CONDITION OF WAR: THE JURISDICTION OF MILITARY COMMISSIONS: QUESTIONS OF PRIZE: BLOCKADE: MRS. ALEXANDER'S COTTON: THE ATLANTA: EFFORTS TO RESTRAIN THE ENFORCEMENT OF THE RECONSTRUCTION ACTS: EX PARTE MILLIGAN: TEXAS *v.* WHITE: CASES GROWING OUT OF THE REBELLION: THE CONFISCATION ACT: CAPTURED AND ABANDONED PROPERTY ACT: EFFECT OF PRESIDENTIAL PARDON: RIGHTS OF OFFICERS AND SOLDIERS OF THE ARMY OF THE UNITED STATES: CALIFORNIA LAND TITLES: THE OBLIGATION OF CONTRACTS: THE RIGHT OF THE FEDERAL JUDICIARY TO DISREGARD STATE DECISIONS ON QUESTIONS OF COMMERCIAL LAW: PATENTS: POLICE POWERS OF THE STATES: THE COMMERCE CLAUSE: CRANDALL *v.* STATE OF NEVADA: STATE FREIGHT TAX: GILMAN *v.* CITY OF PHILADELPHIA: MISCELLANEOUS CASES.

AT the commencement of December Term, 1861, there were three vacancies upon the Bench of the Supreme Court, occasioned by the deaths of Justices Daniel and McLean, and by the resignation of Mr. Justice Campbell, who had espoused the cause of Secession. Chief Justice Taney, and Justices Clifford and Catron were absent, the first on account of age and infirmities, the last, also an aged man, on account of illness. The work was done by less than a majority. Mr. Justice Wayne, the senior associate, who had taken his seat upon the bench before the death of Marshall, presided, assisted by Justices Nelson, Grier and Swayne, the latter being appointed after the beginning of the term.

At the opening of the proceedings Mr. Edward Bates, Attorney-General of the United States, declared that the Court had held no sadder term since its organization. "Your lawful jurisdiction," said he, "is practically restrained. Your just power is diminished, and into a large portion of our country your writ does not run; and your beneficent authority to administer justice according to law is for the present successfully denied and resisted. The country presents a ghastly spectacle. A great nation lately united, prosperous and happy, and buoyant with hopes of future glory, is torn into warring fragments, and the land, once beautiful and rich in the flowers and fruits of peaceful culture, is stained with blood and blackened with fire. In all that wide space from the Potomac to the Rio Grande, and from the Atlantic to the Missouri, the still, small voice of legal justice is drowned by the incessant roll of the drum and the deafening thunder of artillery. To that extent your just and lawful power is practically annulled, for the laws are silent amidst arms."

Although war was actually raging no traces of its ravages can be found in the Reports. The serene atmosphere of the Court had not yet been disturbed. But few barristers had donned the uniform of the soldier, and the Bench had not yet been invited to consider questions of prize. The Judges still sat to discuss matters of account, patents, admiralty, agency, practice, land claims and trusts, and in the case of the *Jefferson Branch Bank v. Skelly*,¹ exercised the highest of their prerogatives, in determining that the decision of a State Court upon a matter of contract made by a State with the incorporators was not conclusive of the question if

¹ 1 Black, 436 (1861).

the action of the State, sustained by her own tribunals, impaired the validity of that contract.

In the case of *The Ohio and Mississippi Rail Road Company v. Wheeler*,¹ Chief Justice Taney, in affirmation of the line of reasoning pursued in several former cases,² held that where a corporation is created by the laws of a State the legal presumption is that its members are citizens of the State in which alone it has a corporate existence, and a suit by or against it in its corporate name must be presumed to be a suit by or against citizens of the State which created it, and no averment to the contrary would be tolerated in support of an effort to withdraw the suit from the jurisdiction of the Federal Courts.

Land claims of immense magnitude, involving nice questions, arising under Mexican and Spanish laws in force in the State of California, and claims arising under French and Spanish laws under the Louisiana Treaty, taxed the energy of both bench and bar.³ These cases were argued in the most exhaustive manner, and were discussed at great length upon the bench.

But in 1862 the *Prize Cases* arose, in which the rights and liabilities of neutrals as to blockade, and violations of blockade, the President's right to institute a blockade, and what constituted sufficient evidence of a Presidential proclamation, were discussed at great length, and conclusions were reached which have become incorporated into the great body of International Law.⁴

¹1 Black, 286 (1861).

²Louisville, Cincinnati and Charleston R. R. Co. v. Letson, 2 Howard, 497 (1844). Marshall v. The Baltimore and Ohio R. R. Co., 16 Howard, 314 (1853). Covington Drawbridge Co. v. Shepherd *et al.*, 20 Howard, 227 (1857).

³United States v. Andres Castillero, 2 Black, 18 (1862).

⁴The Prize Cases, 2 Black, 635, (1862).

The importance of these decisions cannot be over-estimated. There are crises in jurisprudence as well as in war. The fate of our nation hung no less upon the determinations of the Supreme Court, than upon the gathering of armies and the fitting out of fleets. The proclamations of President Lincoln of April 19th and 27th, 1861, the blockade of the Southern ports, and the capture on the high seas of ships carrying contraband goods, or of ships owned by citizens residing in the rebellious States raised the vital questions, Was there a war? Could there be prize? The real peril of the situation is best described by Mr. Richard H. Dana, Jr., one of the counsel for the Government, in a letter written upon the 9th of March, 1863. He said:

"The Government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the Government to exercise war powers,—deny that this can be, in point of law, a war. So the Judiciary is actually, after a war of twenty-three months' duration, to decide whether the Government has the legal capacity to exert these war powers. . . . Contemplate, my dear sir, the possibility of the Supreme Court deciding that this blockade is illegal! What a position it would put us in before the world, whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine, and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers, it is fearful to contemplate! Yet such an event is legally possible,—I do not think it probable, hardly possible, in fact. But last year I think there was danger of such a result when the blockade was new, and before the three new Judges were appointed."¹

¹ Charles Francis Adams, "Life of Richard Henry Dana," Vol. II, p. 267.

The three new judges referred to were Swayne, Miller and Davis, all appointed by President Lincoln in 1862. As Mr. Adams points out before they took their seats, the Supreme Court was composed of Chief Justice Taney, and the five Associate Justices, Wayne, Catron, Nelson, Grier, and Clifford, all Democrats, and

The cases were argued by Mr. Dana, Mr. Evarts and Attorney-General Bates, for the United States, and by Messrs. Carlisle, Lord, Edwards and Bangs for the claimants, in a manner worthy of the issue and of the tribunal.

The opinion of the Court was delivered by Mr. Justice Grier:

"This greatest of civil wars," said he, "was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact. It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. . . . As soon as the news of the attack on Fort Sumter and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit: on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, 'recognizing hostilities as existing between the Government of the United States of America and certain States, styling themselves the Confederate States of America.' This was immediately followed by similar declarations, or silent acquiescence by other nations. After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war, with all its consequences as regards neutrals. They cannot ask a Court to affect technical ignorance of the existence of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze

three of them appointed from slave-holding States. What made the situation more grave was the fact that the Chief Justice had already from his Circuit bench in the Merryman case challenged the legality of that most important act of President Lincoln, the suspension of the Habeas Corpus Act. A graphic statement of the crisis in public affairs is given in a letter of Mr. Thornton K. Lothrop written to Mr. Adams. "Life of Dana," by C. F. Adams Vol. II, Appendix, p. 395.

its power by subtle definitions and ingenious sophisms. The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court is now for the first time desired to pronounce, to wit: that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies and commenced hostilities, are not enemies because they are traitors; and a war levied on the Government by traitors in order to dismember and destroy it, is not a war, because it is an insurrection."

Having determined, therefore, that the President had a right *jure belli*, to institute a blockade of ports in the possession of the States in rebellion, which neutrals were bound to regard, Mr. Justice Grier went on to show that the term "enemy" was properly applicable to all persons residing within enemy territory whose property might be used to increase the revenues of the hostile power, though not foreigners. "They have cast off their allegiance," said he, "and made war on their government, and are none the less enemies because they are traitors."

In the case of a vessel owned by foreigners he held that the cargo, having been shipped after notice of the blockade, should follow the fate of the vessel, and in each and every case the judgment of condemnation in the court below was affirmed.

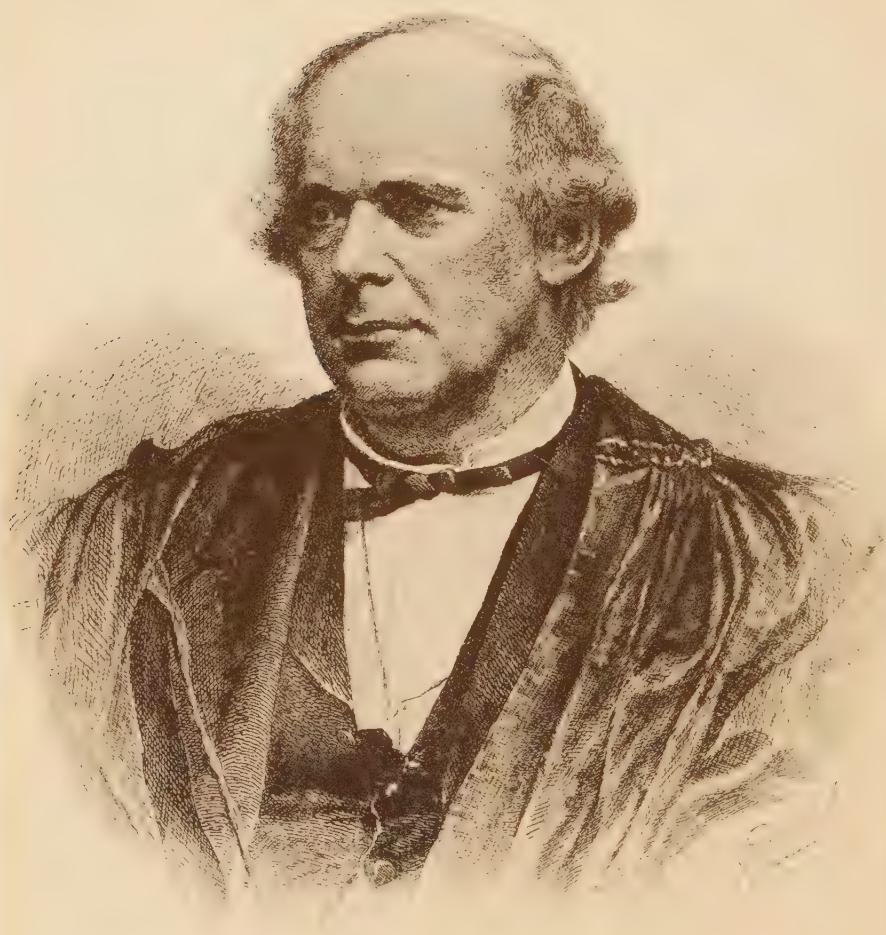
From these doctrines Mr. Justice Nelson dissented in a very elaborate opinion. His conclusions were that no civil war existed between the Federal government and the States in insurrection, until recognized by the Act of Congress of 13th of July, 1861, and that the President did not possess the power, under the Constitution, to declare war, or recognize its existence within the meaning of the law of nations, which carried with it belligerent rights, and thus change the

condition of the country and all its citizens from a state of peace into a state of war. He contended that the decrees of condemnation ought to be reversed, and the vessels and cargoes restored. In one of the cases Chief Justice Taney and Justices Catron and Clifford united with him in dissent.

At the same critical hour the inestimable value of the principles established by Chief Justice Marshall was shown, in an opinion delivered by Mr. Justice Nelson, in the case of *The People of the State of New York v. Commissioners of Taxes*,¹ in which it was held that that portion of the capital of a New York Bank which had been invested in stocks, bonds or other securities of the United States, was not liable to taxation by the State. A tax on the loans of the Federal Government is a restriction, said the Court, upon the Constitutional power of the United States to borrow money, and if a State had such a right, being in its nature unlimited, it might be so used as to defeat the Federal power altogether.

Chief Justice Taney was so much indisposed as to be

¹ 2 Black, 620 (1862). The same conclusion was reached in the Bank tax case, 2 Wallace, 200 (1864), where it was held that a State tax on the capital of a State bank is a tax on the property of the institution, and when it consists of the stocks of the United States such tax is invalid. See also *Van Allen v. Assessors*, 3 Wallace, 573 (1865) in which a distinction was drawn between a tax on the capital of the bank and a tax upon shares held in a bank, which were held to be a distinct and independent interest or property held by the shareholder, and that Congress had legislated in such a manner as to leave the shares of the stockholders subject to State tax. United States bonds were not liable to taxation under State legislation. *The Banks v. The Mayor*, 7 Wallace, 16 (1868). United States notes issued under the Acts of 1862 and 1863 were not liable to State taxation. *Bank v. Supervisors*, *Ibid.* 26 (1868). A tax imposed by Congress on bank circulation is Constitutional, *Veazie Bank v. Fenno*, 8 Wallace, 533 (1869). In all these cases the opinion was delivered by Chief Justice Chase. In *First National Bank v. Commonwealth of Kentucky*, 9 Wallace, 353 (1869), it was held in an opinion by Mr. Justice Miller that though the capital of a bank, invested in Federal securities, could not be taxed by a State, yet the shareholders might be taxed on their shares. See also *R. R. Co. v. Peniston*, 18 Wallace, 5 (1873); *The Delaware Railroad Tax Case* *Ibid.* 206, (1873).



H. Man

unable to sit during 1863, and died in October, 1864. Salmon P. Chase was commissioned as his successor upon the 6th of December, of that year. At this time Mr. Chase was in the fifty-sixth year of his age, but his iron frame and robust constitution gave promise of a long career. It was not so ordained. In eight years he succumbed to the effects of superhuman labor and the exhaustion of the vital forces which had followed the years of sleepless anxiety attending his exertions as Secretary of the Treasury during the greater part of President Lincoln's administration. In point of natural ability he was the equal of any of his predecessors, and their superior in a commanding and majestic personal presence, which was in harmony with his great intellectual powers. Fifteen years of absence from the bar, during which he had devoted himself almost exclusively to the political questions of the day, had done much to obscure his fame as a lawyer, and to dull his law learning by disuse; but he seated himself with ease and grace in the chair of justice, and exhibited from the outset faculties entirely adequate to the able and satisfactory discharge of his high duties. "The ability of his judgments," said Mr. Reverdy Johnson, "the full knowledge which they displayed, and the admirable judicial style in which they were rendered, filled the professional mind not only with admiration, but with wonder." Almost all of the opinions of the Supreme Court involving questions of international law or of prize growing out of the Civil War, were written by him, and display not only his thorough familiarity with controlling principles, but his extraordinary skill in applying them to new and perplexing conditions. They are remarkable examples of clearness and force.

He was born in Cornish, New Hampshire, on the 13th of January, 1808. The blood of the English Puritan and of

the Scotch Covenanter mingled in his veins, and the sturdy, resolute and independent traits of his ancestry were fully displayed at every stage of his varied career. He was descended in the ninth generation from Thomas Chase, of Chesham, England, and in the sixth from Aquila Chase, who came to Newbury, Massachusetts, in 1640.

He was the eighth of the eleven children of Ithamar Chase, and his wife, Jeanette Ralston, a woman of Scotch descent. Of his father's seven brothers, three were lawyers and graduates of Dartmouth College, one a Senator of the United States from Vermont, two were physicians, one a Bishop of the Episcopal Church, and one a farmer. His earliest teacher was Daniel Breck, afterwards a well-known jurist of Kentucky. At school he was attentive, "full of faith, not much given to ask the cause of things," as he himself tells us, but ready to accept what was told him. An amusing incident is recorded of his effort to set the river Ashuelot on fire. He had lost his shoe in a pool, and knowing that water could be dried up by heat, built a fire upon an extemporized raft, and set it afloat, but soon abandoned the attempt. He lost his father at an early age, but was cared for by his uncle, the Bishop, then residing in Ohio, until he was fifteen years old. He then returned to the family home at Keene, and in 1824 entered Dartmouth College, from which he graduated two years later. He then taught school in Washington, D. C., while studying law with William Wirt. At this period he devoted part of his leisure time to light literature, and addressed a poem to the daughters of his preceptor. In 1829 he was admitted to the bar of Washington, but removed to Cincinnati, then the Queen of the West, where he soon acquired an important practice. He prepared an edition of the Statutes of Ohio, which for completeness and thoroughness

has never been surpassed, and which was warmly commended by Chancellor Kent and Mr. Justice Story.

His views in opposition to slavery became pronounced, and were confirmed by witnessing the destruction of the office of James G. Birney's "Philanthropist" by a pro-slavery mob. "Freedom of the press and Constitutional liberty," he solemnly declared, "must live or perish together." A few months later, in 1837, he became counsel for Matilda, an alleged fugitive slave, who had been brought from Virginia by her master to Cincinnati, *en route* to Missouri. Mr. Chase argued, upon an application for a writ of *habeas corpus*, that when a slave-owner voluntarily brought his slave into a free State, the slave by that act became free, and could in no sense be termed a fugitive, or be reclaimed under the Fugitive Slave Law of 1793. He was unsuccessful; but his argument made a profound impression. Mr. Birney was then indicted under a State law for harboring the fugitive, and was convicted and fined. In the appeal to the Supreme Court of Ohio Chase purposely omitted to call attention to the fact that the indictment contained no averment that the defendant knew the person harbored to be a slave, preferring to renew his former contention; for if Matilda were not a slave, Mr. Birney could not be guilty of harboring her as a fugitive. The Court reversed the judgment upon the technical point, and declined to pass upon the main question, but directed the argument of Mr. Chase to be published. His efforts in behalf of freedom were so constant and continuous that he became known in Kentucky as "Attorney General for runaway negroes."

In 1841 he became one of the founders of a Liberty Party. In 1846, with Mr. Seward as a colleague, he argued before the Supreme Court of the United States the case of

John Van Zandt,¹ who had aided in the escape of slaves, as it was charged, although the evidence went to show that, without knowing who they were, he had met them in the road, and taken them some distance in his wagon. He contended that actual notice of the fact of escape was necessary under the Act of 1793; that the Act itself was inconsistent with the Ordinance of 1787 for the government of the Territory Northwest of the Ohio, and was repugnant to the Constitution of the United States. On all of these points he was unsuccessful. In 1850 he was sent to the Senate of the United States through the coalition of the Free-Soilers with the Old-Line Democrats. Here he took part in memorable debates with Clay, Webster, Cass and Douglas. He earnestly opposed the proposal of Jefferson Davis that there should be non-intervention with slavery in the Territories, and spoke against the Compromise measures, which included the Fugitive Slave Law of 1850. He refused to support Pierce for the Presidency, and persistently assailed the Repeal of the Missouri Compromise. He also advocated economy in national finances, a Pacific Railroad, the Homestead Law and cheap postage. In 1855 Mr. Chase became the Republican candidate for Governor of Ohio, and was elected, and afterwards re-elected. He was a supporter of John C. Fremont for the Presidency in 1856, and in 1860 himself received forty-nine votes in the nominating convention. Upon the third ballot Mr. Lincoln was chosen through the support of Mr. Chase's friends. He was again sent to the Senate of the United States, but upon the day after taking his seat was appointed by President Lincoln Secretary of the Treasury. Summoned at a moment of alarming danger and perplexity, he devoted the energies of a comprehen-

¹ 5 Howard, 215 (1847).

sive and creative mind to the administration of the national finances, when immediate decision was indispensable, and delay or debate would have been fatal. The systems of the past were inadequate to the enormous and unexpected strain put upon them. He had to devise new ones, and he seized, wielded and shaped the available wealth of the nation in support of military and naval movements vaster than any known to history. The promptness and vigor with which his strong, sagacious and practical intellect invented and executed measures amid the rapid whirl of swiftly succeeding events, and the untiring and unselfish devotion to duty, which failed to exhaust his magnificent energies, will command the admiration of centuries. As a financier, he stands beside Robert Morris and Alexander Hamilton.

A somewhat persistent lack of harmony in feeling and opinion between the President and the Secretary as to the appointment of a subordinate officer induced Mr. Chase to resign his portfolio, yet shortly afterwards President Lincoln testified the highest regard for his abilities by appointing him Chief Justice of the United States. In the words of Mr. Justice Clifford, "From the first moment he drew the judicial robes around him he viewed all questions submitted to him as a judge in the calm atmosphere of the Bench, and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people."

Mr. Evarts has pointed out that his mental and moral constitution fitted him most conspicuously for judicial service; and, after stating that the Bar had neither unkindly nor unnaturally doubted whether the Chief Justice were competent to handle the diversified subjects and the manifold complexities which were involved in the cases before him, asserts that in all the transcendent functions of the tribunal, the pre-

paration and the adequacy of the Chief Justice were unquestioned.

Mr. Chase presided over the Impeachment of President Johnson before the Senate, and discharged the duties of that novel and exalted position in a spirit of judicial impartiality. Although his conduct was a disappointment to many bitter partisans, who visited upon him the most indiscriminating censure, yet "the charge against him," said Mr. Evarts, "if it had any shape or substance, came only to this: that he brought into the Senate, in his judicial robes, no concealed weapons of party warfare, and that he did not wrest from the Bible, on which he took and administered the judicial oath, the commandment for its observance."

The most notable cases in which he delivered the opinion of the Court will be noticed in the following pages; but it is proper to dwell upon the extraordinary self-possession and calmness of judgment which induced him, after the most serious reflection, to decide that some measures which he had devised as Secretary of the Treasury for the salvation of the country, were unconstitutional when brought to the final test of the law. His action in this particular has led to animadversion; but, as Mr. Justice Clifford has said, "Men find it easy to review others, but much more difficult to criticise and review their own acts, and yet it is the very summit to which the upright judge should always be striving. Judges sometimes surrender with reluctance a favorite opinion, even when condemnation confronts it at every turn, and they find it well nigh impossible to yield it at all when it happens to harmonize with the popular voice, or is gilded with the rays of successful experiment. . . . Judges and jurists may dissent from his final conclusion and hold, as a majority of the justices of this Court do, that he was right as Secretary of the Treasury, but

every generous mind, it seems to me, should honor the candor and self-control which inspired and induced such action."

In the year 1870 he was stricken with paralysis and from that time until his death, upon the 7th of May, 1873, was an invalid.

The senior associate at this time was Nathan Clifford, who was born at Rumney, Grafton County, New Hampshire, upon the 18th of August, 1803. His ancestors had immigrated in 1644, and settled at Hampton. They were farmers, and shared all the hardships and privations common to the pioneers of civilization in the New England States. The records show that many members of the family became conspicuous in the military service during the Colonial wars and the Revolution. The great-grandfather of the Judge was Treasurer and Collector of the town of Rumney, and by his courage and enterprise contributed not a little to the success of that settlement. His father was a man who enjoyed the respect and esteem of the community, of serious and impressive deportment, somewhat stern, but possessed of a high degree of intelligence. His mother was a woman of unusual energy and strength of character, of great vigor and clearness of mind. She lived to a great age, and witnessed the success of her son in attaining the highest honor of his life. Nathan was the only son. He received the rudiments of education in the common schools of his native town, but he was an ambitious boy, and after becoming a pupil in Haverhill Academy, concluded his academical career at the Literary Institute at New Hampton. At the age of eighteen he entered the office of Josiah Quincy, a leading lawyer of Grafton County, supporting himself in the meantime by teaching school, and was admitted to the Bar in 1827. Removing to the western part of Maine, he finally established himself in the town of

Newfield, his removal having been suggested by Chief Justice Shepley, then a leading lawyer in the city of Saco. He soon found occupation. Many land titles were unsettled, and an extensive lumber business was in operation, and as a result of these conditions, litigation, settlements and contracts of great variety called for the services of a well-trained, judicious and able lawyer. At this time the bar of York County was distinguished for its ability. Not long after his settlement here, he was married to Hannah, the eldest daughter of Captain James Ayer, at that time a leading citizen of the town. He was early led towards political life, and had always been a Democrat. In 1830 he was elected to represent his district in the State Legislature, serving until 1834, being Speaker of the House for a part of the time. He was then appointed Attorney-General of the State, and after holding the position for four years, was elected to Congress, in which body he served until 1843. During the Presidential canvass of 1840, he advocated the re-election of Van Buren, meeting in public discussion many of the most distinguished Whig orators, and winning for himself the reputation of being the most eloquent champion of Democracy. In 1846 he was Attorney-General of the United States in the cabinet of President Polk. While adjusting the terms of the Treaty of Peace between the United States and Mexico, he went to the latter country as United States Commissioner with the full powers of an Envoy Extraordinary and Minister Plenipotentiary, and it was largely owing to his diplomatic skill and tact that the treaty of Guadalupe Hidalgo was arranged with the Mexican government by which California became a part of the United States. He was a warm advocate of the annexation of the territory secured; he foresaw the importance of the western country to our grandeur as a nation, the impulse it would



Erasmus Gifford

give to our development, and the necessity of a Western coast line in establishing commerce with the empires of the East. In 1849 he returned to the practice of his profession, removing to the City of Portland, which remained his place of residence until his death.

Here he met in professional conflict such men as John Rand, an experienced and exact lawyer, John M. Adams, who subsequently became his partner, Samuel Wells, afterwards a Judge of the Supreme Court of the State, and William Pitt Fessenden, the distinguished Senator of the United States. In 1858 he was appointed by President Buchanan to the position of Associate Justice of the Supreme Court, his commission being dated the 12th of January of that year. At this time all the District Judges in his circuit were old men. The dockets were crowded with cases, many of them of long standing, and an enormous amount of labor devolved upon the new Judge, but he applied himself with great energy and success. One who knew him well writes: "He was bitterly opposed to anything like judicial legislation. He shrank from strong or forcible constructions based on statutory phraseology only. He sought simply for legislative intention. He saw in the Court the administrator and expounder of the law and the arbiter of each special litigation. He was content to explain the law as it was, excepting when the question of Constitutionality arose. He considered the separate functions of the judicial and legislative branches, as imparted by the Constitution, imposed clearly separate duties on each, which he was not at liberty in the minutest degree to disregard. The wisdom or folly of a law enacted by Congress he was not to direct or influence by judicial construction."

In 1877, as the oldest Associate Justice, he was selected as President of the Electoral Commission, charged with the

duty of deciding upon the character of the returns of the Presidential election from the States of Louisiana, Florida, South Carolina and Oregon. Although Mr. Clifford was a firm believer in the fact of Mr. Tilden's election, he conducted the proceedings with firm and unvarying impartiality. He delivered an opinion upon the question of the Florida returns in accordance with that of the minority, but declined to give any judgments upon the votes of the other contested States. Subsequent to the inauguration of Mr. Hayes he refused to visit the White House.

In October, 1880, he was attacked with serious illness, and owing to a complication of disorders it became necessary to amputate one of his feet to prevent gangrene. From this he never recovered, but died on the 25th of January, 1881.

His opinions form a large part of the forty volumes of Reports, beginning with the latter volumes of Howard, and continuing through Black, Wallace and Otto. His judgments upon the Circuit are embodied in four volumes of Clifford's Reports, edited by his son, William Henry Clifford, Esq., of the Cumberland Bar. After the death of Chief Justice Chase he was acting Chief Justice until the appointment of Chief Justice Waite.

Noah H. Swayne, of Ohio, was appointed an Associate Justice in place of John McLean, deceased, and was commissioned upon the 24th of January, 1862. He was born in Culpepper County, Virginia, on the 7th of December, 1804, and was a descendant of Francis Swayne, who had immigrated to this country in the days of William Penn, accompanied by his family, and settled near Philadelphia. Joshua Swayne, the father of the Judge, who retained his membership in the Society of Friends, removed to the town of Waterford, Virginia, where he gave his son a liberal educa-



W. H. Stoughton

tion. The early studies of the lad were directed towards the medical profession, and at one time he served as an apothecary's clerk in Alexandria. Through the death of his teacher this plan was interrupted. Having lost his father not long afterwards, and his mother being unable to provide for his support while pursuing a collegiate course, he began the study of the law in Warrenton, and was admitted to the Bar in 1823. Two years later he removed to Ohio, opening an office in Coshocton, where he became prosecuting attorney of the county. He was then elected a member of the Ohio Legislature as a Jeffersonian Democrat. In 1830 he was appointed, by President Jackson, District Attorney of the United States, and removed to Columbus. During his service of ten years in that capacity, he declined the office of President Judge of the Court of Common Pleas. He served, however, as a Commissioner to manage the State debt, and as a member of a Committee sent by the Governor to effect a settlement of the boundary lines between the States of Ohio and Michigan, and in 1840 became one of a committee appointed to inquire into the condition of the State Blind Asylum. Becoming interested in public charities, he ever afterwards took a leading part in organizing and visiting asylums and institutions for the blind, the deaf and dumb, and lunatics. His views upon the question of slavery, as well as his personal kindness of disposition, led him, as early as 1832, to emancipate a number of slaves acquired by his marriage. His practice in the meantime had become large and lucrative through constant and unremitting attention to its requirements, and one of the most celebrated of his efforts was his defence of William Rossane and others, in the Circuit Court of the United States held at Columbus in 1853, charged with burning the steamboat *Martha Washington* for the fraudulent

purpose of obtaining the insurance. He also appeared as counsel in fugitive slave cases, and joined the Republican Party upon its formation. So prominent had he become through his bold utterances upon public questions that, upon the 14th of January, 1862, he was appointed by President Lincoln one of the Associate Justices of the Supreme Court at the most critical hour in the history of that tribunal. His views, as expressed in his opinions upon Constitutional questions, were in favor of a firm and uncompromising support of nationality. He struck a high note and maintained it. In the original *Legal Tender* case he dissented from the opinion, which denied full effect to the Act of Congress. He dealt with a vast number of subjects, and became a leader in contending for the existence of a general commercial jurisprudence, which the Supreme Court of the United States was at liberty to recognize and develop in cases involving no Federal question, in opposition to the decisions of the State tribunals. His views were in direct opposition to those of his distinguished colleague, Mr. Justice Miller, and it is through his opinions, in *Gelpcke v. The City of Dubuque*¹ and similar cases, that the doctrine of *Swift v. Tyson* obtained a firm foothold in the Court. In his last opinion he considered fully the important subject of the income tax imposed by the United States, and defined clearly and authoritatively the meaning of the phrase "direct taxes," as used in the Constitution.²

In 1863 he received the degree of LL.D. from Dartmouth and Marietta Colleges, and in 1865 from Yale. A judge of unusual capacity, familiar with adjudged cases, and with settled habits of labor and research, of genial and benevolent courtesy,

¹ 1 Wallace, 175 (1863).

² *Springer v. The United States*, 102 U. S., 586 (1880).



Saml F. Miller

singularly amiable in disposition, and patient even with the dullest, he won not only the cordial esteem, but the warmest affections of the bar.

The second of the appointees of President Lincoln was Samuel Freeman Miller, who was commissioned upon the 16th of July, 1862. Two vacancies existed at the time of his appointment, one caused by the death of Mr. Justice Daniel, and the other by the resignation of Mr. Justice Campbell. Mr. Miller was not named especially for either. He was born of pioneer stock in Richmond, Kentucky, upon the 5th of April, 1816, amid humble surroundings. His father had removed from the town of Reading, in Pennsylvania, some years before, and, shortly after his arrival, purchased a farm upon which the early years of his distinguished son were spent. Like his associate, Mr. Justice Swayne, he found employment in a drug-store and turned his attention to the study of medicine, and upon reaching manhood spent two years in the Medical Department of the Transylvania University, from which he graduated in 1838. For nearly ten years he practiced medicine in Knox County, Kentucky, but, although meeting with success, determined to study law, and was duly admitted to the bar in 1847 at the age of thirty. He strongly hated African slavery and did much to promote the cause of freedom, although he took no active part in politics until after his removal to Iowa in 1850. Here he became the leader of the Republican Party. He was offered and declined numerous State and local offices, preferring to devote himself to his profession in which he took high rank. At a time when the Supreme Court was to be strengthened, if not re-organized, his name was presented to President Lincoln by the members of the bar and the politicians of both parties, sustained by members of Congress, and the singular unanimity of his support, as well as his reputa-

tion for ability of the highest order made such an impression as to win success. "The finding of such a judge by the President was only less fortunate than the finding of such a President by the country." The position which he early acquired and ever maintained was that of a truly great jurist; logical, learned, wise, robust, rugged, simple and honest. It has been estimated that he wrote more opinions of the Court than any Judge living or dead, and more opinions in construction of the Constitution than any Judge who ever sat in the Supreme Court. Those opinions, more than seven hundred in number, including dissents, run through seventy volumes, and are marked by "strength of diction, keen sense of justice and undoubting firmness of conclusion." The most important of them, perhaps the most important decision of the Court in its far-reaching effects since the Rebellion, was in the famous Slaughter House Cases, which has never been overruled or questioned since its delivery, as he himself was wont to assert in tones of conscious pride, although at the time most powerfully dissented from by the most eminent of his brethren. As a Constitutional lawyer, a careful student of his career has pronounced him to be the most eminent authority since the days of Marshall. He had great capacity to seize upon the vital points of controversy and an instinctive command of general principles. A pronounced Federalist in his views of the scope of the powers of the General Government, he so tempered these leanings with a broad conservatism as to bring the Court to the preservation of an even balance between National supremacy and State autonomy. "The just and equal observance of the rights of the States and of the General Government, as defined by the present Constitution," said he, "is as necessary to the permanent prosperity of our country and to its existence for another century as it has been

for the one whose close we are now celebrating. At one time he meditated the preparation of a History of the Supreme Court and collected material to that end, but never put it into shape, but gave warm encouragement and hearty assistance to the present writer. His judicial style is clear, luminous, exact, and impressive, "like his tread, massive, but vigorous." Mr. Justice Miller was warmly interested in professional education, and delivered addresses in various parts of the country, the most notable of which are entitled "The Constitution and the Supreme Court of the United States of America," delivered upon the 29th day of June, 1887, before the Alumni of the Law Department of Michigan, and the Memorial Oration, delivered at the Celebration of the One Hundredth Anniversary of the Framing and Promulgation of the Constitution of the United States, in Independence Square, upon the 17th of September, 1887, in the city of Philadelphia. These addresses have been published since his death with ten lectures upon Constitutional Law in a volume, edited by the accomplished reporter of the Supreme Court, Hon. J. C. Bancroft Davis, entitled "Miller on the Constitution."

David Davis, of Illinois, was commissioned as an Associate Justice to fill one of the existing vacancies in the recess, October 17th, 1862, and re-commissioned upon confirmation on the 8th of December of the same year. He was a native of Cecil County, Maryland, where he was born upon the 9th of March, 1815. His ancestors were Welsh. He was a graduate of Kenyon College, Ohio, in 1832, and went to Massachusetts for the purpose of reading law under the direction of Judge Bishop, in Lenox, subsequently attending a course of lectures at the Yale Law School. In 1835 he removed to Illinois, and was admitted to the bar, finally settling in Bloomington. There he met Abraham Lincoln, and a lifelong attachment

was established between them. He was elected to the State Legislature in 1844, and was a member of the Convention that framed the State Constitution in 1847. In the following year he was chosen Judge of the Eighth Judicial Circuit of the State. He was twice re-elected to this post, and was discharging its duties at the time of his selection by Mr. Lincoln for the Supreme Court of the United States. His interest in politics had been ardent, and he had served as a delegate at large to the Chicago Convention which nominated Lincoln for the Presidency in 1860, and personally accompanied him on his journey to Washington. After the assassination of the President, Mr. Davis acted as administrator of his estate. His views upon Federal questions were pronounced, and he always upheld the highest exercise of Federal power, although in the celebrated *Milligan case*,¹ in sustaining the right of the prisoner to trial by jury, he gave offence to some partisans of the day. His opinion in this case is upon a right of such importance, and is expressed in terms so exalted, as "to be clothed with the heritage of immortality." He was one of the minority in the early *Legal Tender* cases, and contended earnestly in support of the Constitutionality of the power exercised by Congress in making Treasury notes a legal tender in payment of debts. His judicial style is bold and vigorous, but betrays a lack of polish and harmony, and at times his opinions received the revisionary touches of the more scholarly reporters.

In February of 1872 a National Convention of the Labor Reform Party nominated him as its candidate for the Presidency upon a platform that declared in favor of a national currency "based on the faith and resources of the nation and

¹ 4 Wallace, 107 (1866).



David Davis

interchangeable with the 3.65 per cent. bonds of the Government," an eight-hour law, and the payment of the national debt "without mortgaging the property of the people to enrich capitalists." In answer to the letter informing him of his nomination, he wrote: "Be pleased to thank the Convention for the honor they have conferred upon me. The Chief Magistracy of the Republic should neither be sought nor declined by any American." His name was also used before the Liberal Republican Convention at Cincinnati during the same year, and ninety-two and a half votes were cast in his favor upon the first ballot. After the regular nominations had been made, he determined to retire from the contest, and so announced in his final answer to the Labor Reformers. His restlessness upon the Bench had become somewhat marked, and his habit—far from judicial—of freely expressing his views on public questions led to much uneasiness in relation to the probability of his becoming a member of the Electoral Commission. He was counted as hostile to the election of Mr. Hayes, and it was determined, if possible, to exclude him. The exigency did not arise, however, for he resigned his seat in the Supreme Court to take his place in the Senate of the United States, upon the 4th of March, 1877, to which he had been elected by the votes of Independents and Democrats to succeed John A. Logan. In the Senate he was rated as an Independent, or as the representative of a third party whose principles were unannounced, and acted most frequently with the Democrats. After the death of President Garfield in 1881 he was chosen President of the Senate. He resigned his Senatorial office in 1883, and retired to Bloomington, where he quietly resided until his death, which occurred on the 26th of June, 1886. He received the degree of LL.D. from Williams and Beloit Colleges, and the Wesleyan University.

The appointment of an additional Associate Justice was authorized by the Act of March 3rd, 1863, and Mr. Lincoln selected for the place thus created Stephen J. Field, of California, who was duly commissioned upon the 10th of March of the same year.

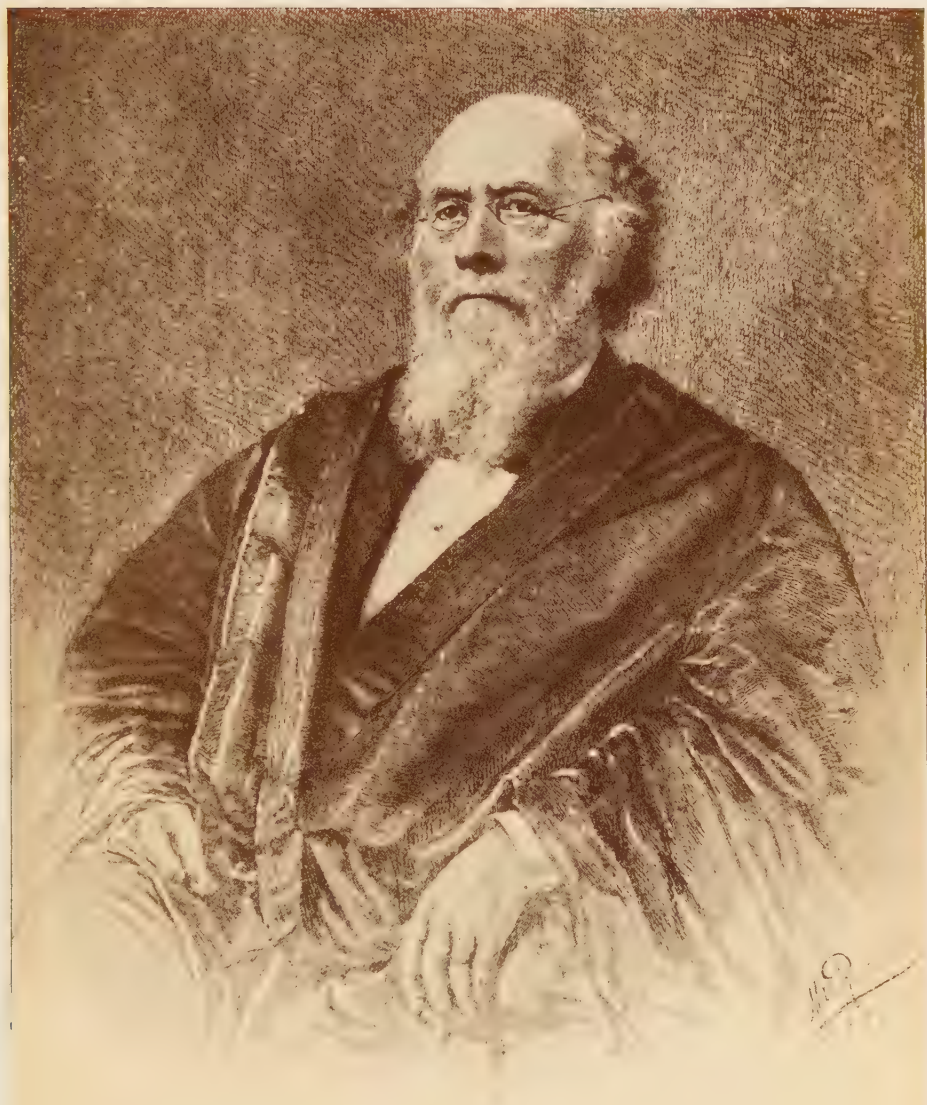
The new Justice, who is now the senior Associate, belongs to a remarkable family. The name is an ancient and honorable one in England, and can be traced back more than eight hundred years to Hubertus De la Feld, who came in the train of the Conqueror. His grandfathers served as officers in the War of the Revolution, and were descended from a Puritan stock, among the oldest in New England. With no exceptional advantages of early training, the living brothers of the Justice, as well as himself, have won a reputation that is world-wide. David Dudley Field, in the effort to reform systems of procedure and promote codification; Cyrus W. Field, in accomplishing that astounding triumph of science and commerce, the submarine telegraph, by which all parts of the world are now united; Henry Martyn Field, in wielding a powerful influence as the editor of one of the leading religious papers of the country, have made the name honored wherever it is known, while the talents of the sister of this extraordinary group of brothers are now represented upon the bench of the Supreme Court by her son, Mr. Justice David J. Brewer, who sits beside his uncle in the highest tribunal of the country.

Stephen Johnson Field was born in Haddam, Connecticut, on the 4th of November, 1816. He was the sixth son in a family of nine children. His father, the Rev. David D. Field, D.D., was a Congregational minister, who removed, in 1819, to Stockbridge, Massachusetts, where the childhood and early youth of the future jurist were happily passed. At the age

of thirteen, he accompanied his elder sister, the wife of the Rev. Josiah Brewer, a missionary, to Smyrna, for the purpose of studying Oriental languages, and thus qualifying himself for a professorship in an American University. He remained in the Levant two and a half years, visiting many islands of the Grecian Archipelago and famous cities of Asia Minor, and passing one winter in Athens, where he acquired a competent knowledge of modern Greek, and also of French, Italian and Turkish. Coming in contact with the members of many religions, Greek, Armenian and Mahometan, he relaxed the narrow creed of the Puritan, and became broadly tolerant. Returning to the United States in 1832, he entered Williams College, and was graduated in 1837 with the highest honors of his class. He then studied law in the office of his brother, David Dudley Field, and was admitted to the Bar in 1841. During a portion of this time he gave instruction to classes at the Albany Female Academy, and pursued his studies in the office of John Van Buren, then Attorney-General of the State. Upon his admission to the Bar, he entered into partnership with his brother, and the relation continued until 1848, when he severed it to travel extensively in Europe. Shortly after his return in the following year, he went to California, and arrived in San Francisco on the 28th of December, 1849, with ten dollars in his pocket. In the following January he established himself in the city of Marysville, became the first Alcalde of the town, and on the adoption of American institutions, a member of the Legislature. During the canvass, which he was obliged to conduct in person, he saw much of rough border and mining life, encountered some strange experiences, and succeeded in saving from a lynch jury a man charged with stealing gold dust. As a legislator, he accomplished during a single term

results which have proved lasting in their effect upon the interests of California and of all the States since formed in the extreme West. He gave to the usages, customs and voluntary regulations of the miners of gold the force of law, and thus laid the foundation for the mining system of the State. He planned a bill reorganizing the judiciary, and established codes of civil and criminal procedure. He also framed an exemption law for the benefit of poor debtors, which is remarkable for its comprehensive and liberal provisions.

Returning to the practice of his profession, which had been destroyed by a "judicial ruffian," he became one of the foremost lawyers of the State, and in the fall of 1857 was elected a Justice of the Supreme Court of the State. Before he could enter upon his term, a vacancy occurred through the death of one of the Justices, and he was appointed by the Governor to fill the unexpired term, and took his seat in October, 1857. Upon the resignation of Chief Justice Terry, he became, in 1859, Chief Justice of the State, and from this office was transferred to the Supreme Court of the United States upon the unanimous recommendation of the Senators and Congressmen of the States composing the new circuit, irrespective of politics. In the State Court he had proved himself to be, in the language of his associate, Judge Baldwin, the ablest jurist who ever presided in the Courts of California. He gave tone, consistency and freedom to her judicature, and laid broad and deep the foundations of her civil and criminal law. The land titles of the State received from his hands their permanent protection. Professor Pomeroy, in a careful study of Mr. Field's career, has stated his judicial qualities to be marked legal learning, the capacity, in an extraordinary degree, to acquire new knowledge and



Stephen Field

skill to appropriate and to assimilate the materials thus obtained with the State or national law; devotion to principle; power of discovering, comprehending and applying principles to a new state of facts; creative power; ability to develop, enlarge and improve the law by means of the "legislative functions belonging to all superior Courts," and intellectual and moral fearlessness.

It was through a display of the latter trait in a decision as to the validity of a city ordinance requiring the queues of Chinese prisoners to be cut off, that he lost the Democratic support of California for the Presidency in 1880. This ordinance he held to be unconstitutional in that it was hostile and discriminating legislation against a class, and was inhibited by the spirit of the Fourteenth Amendment.

In his work in the Supreme Court of the United States he has kept steadily in view two principles—the preservation from every interference or invasion by each other of all the powers and functions allotted to the National Government and the State governments; and the perfect security and protection of private rights from all encroachment either by the United States or by the individual States.

In 1873 Mr. Justice Field was one of three Commissioners appointed by the Governor of California, to examine the codes of the State, and prepare such amendments as seemed necessary for the consideration of the Legislature. In 1877 he served as a member of the Electoral Commission, and acted steadily with the minority, expressing his opinions without qualification. In the summer of 1881 he re-visited Europe, extending his journey to the East as far as Athens and Smyrna, where he had spent several years of boyhood.

His life has been twice attempted. In 1865 he received through the mail a package containing a deadly machine, but

fortunately was prevented from opening it. Upon the inside was found pasted against the lid a copy of his decision in the Pueblo case, by which a large number of speculators and adventurers, who had occupied land in San Francisco as squatters, had been dispossessed. Quite recently his life was menaced by Judge Terry, a man notorious for violence, yet formerly his associate in the Supreme Court of California, who incensed at a decision adverse to his personal interests, assisted by his wife, attempted insult and assassination. Some months afterwards the Deputy United States Marshal, who was specially deputed as an attendant to protect the Justice in the performance of his duties, shot the man Terry in a railway eating-house as he was about to commit a deadly assault upon the Justice, and was seized upon a charge of murder by the Sheriff of San Joaquin County, in the State of California. The United States Circuit Court discharged Neagle from the custody of the Sheriff, and the matter came upon appeal before the Supreme Court of the United States. Under these trying circumstances Mr. Field conducted himself with the utmost courage and firmness.

Mr. Field took the oath of office on the 20th of May, 1863,—his father's birthday—thinking, with a touch of sentiment that is one of the graces of his character, that his aged parent would be gratified to learn that on the day on which he completed his eighty-second year his son had become a Justice of the Supreme Court of the United States.

A variety of interesting questions came before the Court thus constituted, growing directly out of a condition of war. The first of these is *Ex parte Vallandigham*,¹ which was a petition for a certiorari, to be directed to the Judge Advocate

¹ 1 Wallace, 243 (1863).

General of the Army of the United States, to send up to the Supreme Court for review the proceedings of a Military Commission. Clement L. Vallandigham, a noted member of Congress, had been tried and sentenced to imprisonment for stating, in a public speech in a town in Ohio, that the war was wicked, cruel and unnecessary, waged for the freedom of the blacks, and not for the preservation of the Union, and for charging that the United States Government was about to appoint military marshals to deprive the people of their liberties, and for inciting the people to resistance. The prisoner had denied the jurisdiction of the Military Commission, and had refused to plead upon arraignment. The plea of "Not Guilty" was entered for him by authority of the Commission, and the trial proceeded, the prisoner appearing in person, and cross-examining the witnesses. It was held in an exhaustive opinion by Mr. Justice Wayne that the appellate power of the Supreme Court did not extend to a review by certiorari of the proceedings of a Military Commission ordered by a General officer of the United States Army in command of a Military Department.

Several interesting questions of prize also arose, and the first opinion delivered by Chief Justice Chase was in the case of the *Circassian*,¹ in which he had occasion to consider what constituted a blockade, and how it could be made effectual, and whether the blockade of the Louisiana district was terminated by the occupation of the city of New Orleans by Federal forces on the 4th of May, 1862. It was held in the negative, the city itself being hostile, the opposing enemy being still in the neighborhood, the occupation being recent and limited, and subject to the vicissitudes of war. The

¹ 2 Wallace, 135 (1864).

Chief Justice laid it down as a rule of International law that a vessel sailing from a neutral port, with intent to violate a blockade, is liable to capture and condemnation, and is prize from the time of sailing, and that the evidence of this intent may be gathered from papers, letters, and the acts and words of the owners or hirers of the vessel, the shippers of the cargo and their agent, and especially from the spoliation of papers in apprehension of capture. Nor was the intent to violate the blockade disproved by evidence of a purpose to call at another port, not reached at the time of capture, with an ulterior destination to the blockaded port. In the cases of the *Bermuda*,¹ and the *Hart*,² the Chief Justice enters upon an interesting discussion of the rights of neutrals and belligerents, but held that as the cargoes were consigned to enemies, and the greater part of them consisted of goods which were contraband, they must share the fate of the vessels, which had been condemned because of suspicious acts, such as the spoliation of papers.

Another aspect of the same question arose in the case of the *Venice*,³ in which protection under the proclamation of President Lincoln was extended to vessels and their cargoes belonging to citizens of New Orleans or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States.

In the case of the *Baigorry*,⁴ duly affirmed in the cases of the *Josephine*,⁵ and the *Admiral*,⁶ it was held that the blockade of that part of the coast of Louisiana which had no direct connection with the port of New Orleans by navigation,

¹ 3 Wallace, 514 (1865).

² 2 Wallace, 258 (1864).

³ 3 Wallace, 83 (1865).

⁴ *Ibid.*, 559 (1865).

⁵ 2 Wallace, 474 (1864).

⁶ 3 Wallace, 603 (1865).

was not terminated by the proclamation of May 12, 1862, discontinuing the blockade of that port. In the case of *The Slavers*,¹ four libels of information and forfeiture were filed, alleging that the vessels seized had been equipped, loaded and fitted out at New York in the summer of 1860, for the purpose of engaging in the Slave Trade, in violation of the Acts of Congress of March 22, 1794, and April 22, 1818. Although the evidence was conflicting, yet it was held that a professed sale at an excessive price, a false crew-list, an equipment suitable to a slave voyage, a cargo not fully on the manifest, suspicious conduct on the part of the crew, and the appearance and subsequent disappearance of a person with a Spanish name as claimant, were circumstances, which, when unexplained, justified forfeiture.

In the case of *Mrs. Alexander's Cotton*,² the Chief Justice held that cotton in the Southern rebel districts, constituting as it did, the chief reliance of the rebels as the means for purchasing munitions of war, was a proper subject of capture, upon general principles of public law relating to war, even though such cotton was private property, belonging to one friendly to the Union, inasmuch as the personal disposition of the individual inhabitants of hostile territory, as distinguished from that of the enemy people generally, could not be taken into account, unless it could be shown that the relation of the district towards the United States had been changed by the action of the Government itself.³

Perhaps the most interesting case was that of the iron-

¹ 2 Wallace, 350 (1864).

² 2 Wallace, 404 (1865).

³ The same principle was invoked and applied in the cases of the *Gray Jacket*, 5 Wallace, 342 (1866); the *Peterhoff*, 5 Wallace, 28 (1866); *United States v. Weed*, 5 Wallace, 62 (1866); and the *Sea Lion*, 5 Wallace, 630 (1866).

clad *Atlanta*.¹ Originally a British steamer, known as the *Fingall*, she had, early in the war, run the blockade of Savannah, and been converted into an iron-clad at an expense to the Confederate Government exceeding one million dollars. She carried a powerful ram, and had attached to her bow, and carried under water a torpedo charged with about fifty pounds of powder. Much was expected of her; it was predicted that she would raise the blockade of every Southern port and enter in triumph the sea-ports of the North, and as she steamed from Warsaw Sound to engage with two monitors belonging to the United States Government, the *Weehawken*, commanded by Captain Rogers, and the *Nahant*, commanded by Captain Downs, she was accompanied by several steamers thronged with passengers, eager spectators of what, it was anticipated, would prove an easy victory. The monitors slipped their cables and steamed towards the ocean for the purpose of gaining time to prepare for action. The *Atlanta* followed and opened fire upon the *Nahant*, whose guns were silent. The *Weehawken* first rounded and steamed towards the *Atlanta*, until within three hundred yards, when she slowed down and discharged her celebrated gun. The first shot carried a fifteen-inch ball, containing within a hollow sphere thirty-five pounds of powder and weighing four hundred pounds. The effect was to knock a hole in the casemate of the rebel ram, scattering splinters of wood and iron, wounding many men and prostrating as many as forty persons. The effect of this single shot was to demoralize the crew. A second shot struck the top of the pilot-house, crushing and driving down the bars, wounding both pilots and stunning the helmsman. The *Atlanta* immediately hauled down her colors and ran up a small white flag

¹ 3 Wallace, 425 (1865).

as token of surrender. The *Nahant* in the mean time had steamed into position with the intent of discharging a broadside. A claim was made in behalf of the *Nahant* as against the exclusive claim of the *Weehawken*, that as the combined force of the two monitors was superior to that of the *Atlanta*, both were to be regarded as capturing vessels, and that the crews of both monitors had a right to share in the prize money. This contention was sustained by Mr. Justice Field, although the argument of Mr. Reverdy Johnson in behalf of the *Weehawken* was not replied to by the Attorney-General of the United States, upon the principle that it was fair to assume that the advance of the *Nahant* upon the *Atlanta* at full speed with the intention, and doubtless with the ability to inflict injuries similar to those already inflicted by the *Weehawken*, might have hastened the surrender, and that it could hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the *Atlanta*; the mere fact that the only damage done and that the only shots fired were by the *Weehawken* was not decisive of the question. The *Atlanta* had descended the Sound to attack both, and had governed herself in reference to their combined action, and it was not reasonable to suppose that her course would have been the one pursued had she had the *Weehawken* only to encounter.

Another interesting class of cases arose from the efforts of the late Confederate States to restrain the enforcement of the Reconstruction Acts of Congress. The first was that of *The State of Mississippi v. President Johnson*,¹ in which the State sought to restrain, by injunction, the President of the United States from carrying into effect an Act of Congress

¹4 Wallace, 475 (1866).

which was alleged to be unconstitutional. An objection was raised, by the Attorney-General of the United States, upon a motion for leave to file a bill, that no such bill should be allowed to be filed in this Court, and the question of jurisdiction was elaborately argued. The Chief Justice, in delivering the opinion, drew the distinction between ministerial and executive duties, and pointed out that the cardinal vice in the argument of counsel for the State of Mississippi consisted of the assumption that the President, in the execution of the Reconstruction Acts, was required to perform a mere ministerial duty. It was shown that an attempt on the part of the Judicial department of the Government to interfere with the performance of Executive duties would be an absurd and excessive extravagance, and that if the President refused obedience it was needless to declare that the Court was without power to enforce its process; and if, on the other hand, the President complied with the order of the Court, and refused to execute the Acts of Congress, it was equally clear that a collision would occur between the Executive and Legislative departments of the Government, which would in all probability lead to the Impeachment of the President for such refusal, and that, in such a case, if the Court interfered in behalf of the President, thus endangered by compliance with its mandate, and sought to restrain by injunction the Senate from sitting as a Court of Impeachment, the strange spectacle would be offered to the public of an attempt by the Supreme Court to arrest Impeachment proceedings. Upon such grounds the motion was denied.

The question was raised a second time, in the case of *The State of Georgia v. Stanton*,¹ where a bill was filed by

¹6 Wallace, 50 (1867).

the plaintiff State against the Secretary of War, the Secretary of State, and the General of the Army, to restrain them from carrying into execution laws which, it was alleged, would annul and totally abolish the existing State government of Georgia. In an opinion delivered by Mr. Justice Nelson it was shown that the question involved was purely political, and that the Court had no jurisdiction, the decision of Marshall in *The Cherokee Nation v. Georgia* being relied upon as conclusive authority against the exercise of any right or power on the part of the Court to interfere with political questions, for, as was said, "the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its Constitutional powers and privileges. No case of private rights infringed, or in danger of actual or threatened infringement, is presented by the bill in a judicial form for the judgment of the Court." The moralist might instance this as a decree of retributive justice, pronounced against the State of Georgia for her defiance of Marshall's judgment in the case of *Worcester v. Georgia*.

In the case of *Ex parte Milligan*¹ a question arose somewhat similar to that disposed of in *Ex parte Vallandigham*, which, although criticised at the time as a departure from doctrines thought to be essential to the preservation of the Union, has now come to be regarded as one of the leading decisions in favor of personal liberty, and in support of the rights of the citizen, to be found in our national jurisprudence. It was held upon an application for a writ of *habeas corpus* that a Military Commission had no jurisdiction to try and sentence one not a resident of one of the rebellious States

¹4 Wallace, 2 (1866).

nor a prisoner of war, and that a citizen of a State not in open rebellion, who was never in the military or naval service, but who was, while at home, arrested by the military power of the United States, imprisoned, and tried, and sentenced to be hanged by a Military Commission for words spoken in a public speech, was not subject to martial law, but was entitled, under the Constitution, to the right of trial by jury. It was further held that martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction, and that though the suspension of the privilege of the writ of *habeas corpus* had been pleaded, yet that did not suspend the writ itself; that the writ issued as a matter of course, and upon the return made, the court would decide whether the party applying was to be denied the right of proceeding further.

In the greatly celebrated case of *The State of Texas v. White*¹ the nature of a State under our Constitution, and the effect of an attempted secession, were exhaustively considered. The suit was an appeal to the original jurisdiction of the Court by the State of Texas claiming certain bonds of the United States as her property, and asking for an injunction to restrain the defendants from receiving payment from the National Government, and to compel the surrender of the bonds to the State. To this it was replied that Texas had withdrawn from the Union, and had not been rehabilitated. The magnitude and importance of the question excited the greatest interest, and the opinion of the Chief Justice is a most elaborate review of the nature of our government.

“The Union of the States,” said he, “never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of

¹7 Wallace, 700 (1868).

common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared 'to be perpetual' and when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble union more clearly than by these words. What can be indissoluble if a perpetual union made more perfect is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the State were much restricted, still all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people, and we have already had occasion to remark at this term that the people of each State compose a State having its own government and endowed with all the functions essential to separate and independent existence, and that without the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union, and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

From this judgment Mr. Justice Grier dissented on the ground that the case was to be decided upon the basis of political facts and not of legal fictions; that the Court was bound to know and notice the public history of the nation, and that with a due regard for the truth of history during the past eight years, he could not discover that the State of Texas

remained as one of the United States. Adopting the definition of a State given by Chief Justice Marshall in *Hepburn v. Ellzey*,¹ he contended that as Texas was not represented upon the floor of Congress by members chosen by the people of that State, nor by Senators to represent her as a State in the Senate of the United States, and as she did not participate in the late election of President, but was then held and governed as a mere province, by military forces, that she did not fulfill the requirements of the definition.

In this dissent he was joined by Justices Swayne and Miller, all of them being of the opinion that the Court was bound by the acts of the Legislative department of the Government in relation to the State. The decree, however, as entered, gave to the State of Texas the relief sought by her bill.

Several important cases, decided in 1870, presented a variety of questions growing out of the Rebellion.

In the *Grapeshot*² the power of the President to establish provisional courts, in portions of insurgent territory occupied by the National forces, for the consideration of causes arising under the laws of the State and United States, was sustained. At the close of the war all cases pending in these courts were transferred to the United States Circuit Court for the proper district, with the same effect as if originally brought there.

In *United States v. Anderson*,³ the 20th of August, 1866, was fixed as the time when the Rebellion was suppressed as respects the rights intended to be secured by the Captured and Abandoned Property Act.

In *United States v. Keebler*,⁴ it was held that a payment made by a United States officer, of certain public moneys in

¹2 Cranch, 452, (1805).

³9 Wallace, 56 (1869).

²9 Wallace, 129 (1869).

⁴9 Wallace, 83 (1869).

his hands, to the Confederate Government, under a so-called act of sequestration, did not discharge his bond. Mr. Justice Miller held that it could not be admitted for a moment that the statute of the Confederate States, or the order of its Postmaster-General, could have the legal effect of making the payment valid; that the whole Confederate power must be regarded as a usurpation by unlawful authority, incapable of divesting, by an act of its Congress, or an order of one of its departments, any right or property of the United States.

In *Hickman v. Jones*¹ it was held that the Rebellion was only an insurrection, that there was no rebel Government *de facto* in such a sense as to give any legal efficacy to its acts; that although for the sake of humanity certain belligerent rights were conceded to the insurgents in arms, yet such partial recognition did not extend to the pretended Government of the Confederacy. Therefore an act of the Confederate Congress creating a court was void; the court was a nullity, and could exercise no rightful jurisdiction, and could give no protection to those who assumed to be its officers.

In *United States v. Lane*² a contract for Confederate cotton was held to be illegal, and a vessel and cargo engaged in illegal traffic with the enemy were said to be properly seized.

In *Thorington v. Smith*³ it was held that a contract for the payment of Confederate notes made during the Rebellion between parties residing within the so-called Confederate States could be enforced in the Courts of the United States, and that, under certain limitations, obligations assumed by a

¹ 9 Wallace, 197 (1869).

² 8 Wallace, 185 (1868). See also *Morris's Cotton*, *Ibid.*, 507 (1869).

³ *Ibid.*, 1 (1868).

Government *de facto*, in behalf of the country or otherwise, will in general be respected by the Government *de jure* when restored; that Confederate notes must be regarded as a currency imposed on the community by irresistible force, and that a party stipulating for payment in Confederate dollars could recover their actual value at the time and place of the contract in lawful money of the United States.

In the case of the *Protector*¹ it was held that the time during which the war lasted was not to be counted in reckoning the time allowed for an appeal from an Alabama Court.

In *Boyce v. Tabb*² it was held that it was not a legal defence to a suit on a promissory note executed in Louisiana in 1861, that the note was given for the price of slaves sold to the maker; that contracts relating to slaves, valid at the time they were made, were not impaired by the Thirteenth Amendment to the Constitution. The opinion was delivered by Mr. Justice Davis, the case being in direct line with the previous decisions of *White v. Hart*³ and *Osborn v. Nicholson*.⁴

In close connection with the cases arising out of the war are those which are known as the "Test Oath Cases," in which the meaning of the Constitutional clause prohibiting bills of attainder was fully settled and defined.⁵ In the first of these the Constitution of the State of Missouri had imposed a test oath, known as the "Oath of Loyalty," upon all persons who should assume the duties of any office to which they might be appointed otherwise than by a vote of the peo-

¹ 9 Wallace, 687 (1869).

² 18 Wallace, 546 (1873).

³ 13 Wallace, 647 (1871).

⁴ *Ibid.*, 655 (1871).

⁵ *Cummings v. Missouri*, 4 Wallace, 277 (1866). *Ex parte Garland*, *Ibid.* 333 (1866).

ple, and it was expressly provided that no person should be competent as a bishop, priest, deacon, minister, elder or other clergyman of any religious persuasion, sect or denomination, to preach, teach, or solemnize marriages unless he had first taken the oath. Cummings, who was a Catholic priest, had refused to be sworn, and had been indicted, tried and convicted, and sentenced to pay a fine. On appeal to the Supreme Court of the State, the judgment was affirmed, and the case was then brought to the Supreme Court of the United States. It was argued with supreme ability by Montgomery Blair, David Dudley Field and Reverdy Johnson for Mr. Cummings, and by Mr. Strong and Senator Henderson, of Missouri, for the State. The opinion was delivered by Mr. Justice Field, in which he held that the test oath prescribed was a violation of that provision of the Constitution of the United States which provided that no State shall pass any bill of attainder or *ex post facto* laws; that a bill of attainder is a legislative act which inflicts punishment without judicial trial, and that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or which imposes additional punishment to that originally prescribed; that disqualification from office or from the pursuits of an office or lawful vocation is a punishment. Chief Justice Chase and Justices Miller, Swayne, and Davis dissented.

The next case was that of Mr. Garland, and involved the validity of the "Iron-clad Oath," as it was termed, prescribed for attorneys by the Act of Congress of January 24th, 1865. Mr. Garland, subsequently Attorney-General of the United States, had been a member of the Bar of the Supreme Court of the United States prior to the Civil War, but when the State of Arkansas passed her ordinance of secession, had fol-

lowed her out of the Union, and was one of her representatives in the Congress of the Confederacy. In July of 1865 he received from the President a full pardon for all offences committed by his participation in the rebellion, and at the following term of the Court produced his pardon, and asked permission to continue to practice as attorney and counsellor, without taking the oath required by the Act and the rule of Court made in conformity with it, as he was unable to take it because of the offices he had held under the Confederate Government. Mr. Justice Field, delivering the opinion of the Court, held that the Act was unconstitutional and void, and that exclusion from any of the professions, or any of the ordinary vocations of life for past conduct, could be regarded in no other light than as punishment; that all enactments of the kind were subject to the Constitutional prohibition against the passage of bills of attainder. Besides this, the pardon of the President relieved the petitioner from the oath required. Mr. Justice Miller again dissented, in which he was joined by Justices Swayne and Davis. The ground of the dissent was stated to be that the National Legislature had the right to exclude from office and places of high public trust, the administration of whose functions are essential to the very existence of the Government, those among its own citizens who had been engaged in a recent effort to destroy that Government by force, and that it was hoped that the exceptional circumstances which gave importance to the case would soon pass away, and that the conduct of the persons affected by the legislation would afford sufficient cause to justify its repeal or essential modification.

A similar result was reached in the case of *Pierce v. Car-skadon*,¹ upon the ground that any act of a State which de-

¹ 16 Wallace, 234 (1867).

prived defendants of an existing right for past misconduct and without a judicial trial partook of the nature of a bill of pains and penalties, and was subject to the Constitutional prohibition. Mr. Justice Field again delivered the opinion of the Court, Mr. Justice Bradley dissenting on the ground that the test oath in question was as competent for the State to exact as a war measure in time of civil war.

A singular instance of legislative interference with the right of the Court to consider a question properly before it occurs in *Ex parte McCardle*,¹ which was twice before the Court. McCardle had been arrested and held in custody by a Military Commission, organized in the State of Mississippi under the Reconstruction Acts, upon charges of disturbing the public peace, inciting to insurrection, and impeding reconstruction. He duly applied to the Circuit Court of the United States for the proper district for a writ of *habeas corpus*, which was accordingly issued, but upon the return of the officer, displaying his authority, the prisoner was remanded. From this judgment he appealed to the Supreme Court. As the case involved the validity of the Reconstruction Acts, it excited universal interest, and was argued by counsel of the greatest professional eminence. Judge Sharkey and Robert J. Walker, of Mississippi, David Dudley Field and Charles O'Connor, of New York, and Jeremiah S. Black, of Pennsylvania, appeared for the appellant, while Matthew H. Carpenter of Wisconsin, Lyman Trumbull, of Illinois, and Henry Stanbery, Attorney-General of the United States, appeared upon the other side. Before the case was decided, an Act was introduced into Congress repealing so much of the law as authorized the appeal to the Supreme Court from the judgment of the Circuit Court

¹ 6 Wallace, 318 (1867); 7 Wallace, 506 (1868).

on writs of *habeas corpus*, or the exercise of jurisdiction on appeals already taken. The President vetoed the bill, but Congress passed it over his veto, and it became a law. While the Act was pending in Congress, the attention of the Court was called to it, and Mr. Justice Grier wrote a brief but forcible protest against any postponement of the decision of the case until the Act should be disposed of. In this protest Mr. Justice Field concurred. The validity of the Act, however, was sustained in an opinion by the Chief Justice, in which it was held that no judgment could be rendered in a suit after the repeal of the Act under which it had been brought and prosecuted. "It is quite clear," said he, "that this Court cannot proceed to pronounce judgment in this case as it has no longer jurisdiction of the appeal, and judicial duty is not less fitly performed by declining ungranted jurisdiction, than in exercising formally that which the Constitution and laws confer."

In *Corbett v. Nutt*¹ and *Miller v. The United States*² the Constitutionality of the Confiscation Act came directly before the Court. The validity of the Act was sustained by Mr. Justice Strong, upholding the power of Congress to legislate for the punishment of offences against the sovereignty of the Union, and declaring that the portion which provided for the confiscation of the property of rebels was passed in the exercise of the war powers of the Government. Justices Field, Clifford and Davis dissented, the two former because of the character of the Act, the latter because of the character of the property seized.³

¹ 10 Wallace, 464 (1870).

² 11 Wallace, 268 (1870).

³ See also *McVeigh v. Windsor*, 11 Wallace, 259 (1870). *Osborne v. United States*, 91 U. S., 475 (1875); *Windsor v. McVeigh*, 93 U. S., 274 (1876).

In *Conrad v. Wafles*¹ the Court held that the Act in its provisions for the confiscation of property applied only to the property of persons who thereafter might be guilty of acts of disloyalty and treason, and that the provisions declaring all transfers of property by enemies null and void, only invalidated the transaction as against the right of the United States to claim the forfeiture of the property.

And in *Burbank v. Conrad*² it was held that by the decree of condemnation under the Act, the United States acquired only the life estate of the alleged offender actually possessed by him at the time of its seizure, and that accordingly a previous sale, although not recorded, was not affected.

Several cases came before the Court on appeal from the Court of Claims, which had been brought for the recovery of the proceeds of cotton seized by officers of the United States under the Captured and Abandoned Property Act of March 12th, 1863. In *Padelford's case*,³ the petitioner having taken the oath of allegiance prescribed by the proclamation of President Lincoln, of December 8th, 1863, and kept it inviolate, it was held that he was entitled to claim the proceeds of cotton subsequently seized and sold under the Act; that the effect of the Presidential pardon, in the eye of the law, was to make the offender as innocent as if he had never committed the offence; that the pardon had purged him at the time of the seizure. In the words of the Chief Justice, "The law made the grant of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion."

In *Klein's case*⁴ the validity of an Act of Congress which undertook to do away with the effect and operation of a pardon was brought to the notice of the Court. The Court held

¹96 U. S., 279 (1877).

²*Ibid.* 291 (1877).

³9 Wallace, 531 (1869).

⁴13 Wallace, 129 (1871).

the Act to be unconstitutional, as being in substance an attempt to prescribe to the Judiciary the effect to be given to the previous pardon of the President. "It is clear," said the Chief Justice, "that the Legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the Court to be instrumental to that end."

In *Mrs. Armstrong's case*¹ the Court declined to consider whether the evidence was sufficient to prove that the claimant had given aid and comfort to the rebellion, and held that the Presidential proclamation of pardon "was a public act of which all Courts of the United States are bound to take notice, and to which all Courts are bound to give effect."²

In various other cases the Court considered the legislative power of the insurgent States during the Civil War, and the extent to which the Confederate Government could be regarded as a *de facto* Government.³

It was held in general that all the enactments of the *de facto* legislatures in the insurrectionary States during the war, which were not in terms hostile to the Union or to the authority of the General Government, and which were not in conflict with the Constitution of the United States or of the States, had the same validity as if they had been the enact-

¹ 13 Wallace, 154 (1871).

² See also *Knote v. United States*, 95 U. S., 154 (1877).

³ *Horne v. Lockhart*, 17 Wallace, 580 (1873). *United States v. Insurance Companies*, 22 Wallace, 103 (1874). *Sprott v. United States*, 20 Wallace, 464 (1874).

ments of legitimate legislatures. Any other doctrine than this, it was asserted, would work great and unnecessary hardship upon the people of such States without any corresponding benefit to the citizens of other States, and without any advantage to the National Government.¹

The Court also sustained the right of citizens not in the military service, in States where the several Courts were open and in the undisturbed exercise of their jurisdiction, to protection from military arrest and imprisonment during the war.²

The same protection was extended to officers and soldiers of the Army of the United States in the enemy's country during the war.³ And in the case of *Dow v. Johnson*,⁴ the point was determined that an officer of the Army of the United States, while in service in the enemy's country, was not liable to a civil action in the courts of that country for injuries resulting from acts of war ordered by him in his military character, and that he could not be called upon to justify or explain his conduct in that civil tribunal, his responsibility being only to his own Government and its laws.

The obligation of contracts was considered in the *Binghamton Bridge Case*,⁵ in which the doctrines of the Dartmouth College case were again affirmed and enforced in the strictest manner. An interesting contrast is presented by *Bridge Proprietors v. Hoboken Company*,⁶ in which an act of the State of New Jersey, passed in 1790, creating a turnpike company, had given certain commissioners power to make a

¹See opinion of Mr. Justice Strong in *United States v. Insurance Companies*, 22 Wallace, 103 (1874).

²*Beckwith v. Bean*, 18 Wallace, 510 (1873).

³*Coleman v. State of Tennessee*, 97 U. S., 509 (1878).

⁴100 U. S., 158 (1879).

⁵3 Wallace, 51 (1865). See also *Turnpike Co. v. State*, *Ibid.*, 210 (1865).

⁶1 Wallace, 116 (1863).

contract with any person for the building of a bridge over the Hackensack River: it was provided that the contract should be binding on the parties so contracting as well as on the State, and that it should not be lawful for any person whatsoever to erect any other bridge for a term of ninety-nine years. It was held that although this was a contract which could not be impaired, yet a railway viaduct consisting of a structure made so as to lay iron rails thereon, on which engines and cars could be propelled, but which could not be crossed by man or beast except in railway cars, was not a bridge in the sense of the Act of 1790. Mr. Justice Miller, in delivering the opinion of the Court, after admitting that those who built the bridge were entitled to protection against the erection of another bridge, and that the grant of tolls for a period of ninety-nine years had created a necessary monopoly, without which the corporators would not have invested their money, pointed out that in the course of seventy years the progress of the world in the arts and sciences had been so rapid, and human enterprise had introduced such radical changes in the means of transportation of persons and property, including those of crossing water-courses, both large and small, to which steam was applied, as to work a revolution, and that the word "bridge," in the ancient statute ought not to be and could not be construed in a broad sense so as to arrest the march of improvement.

Mr. Justice Grier concurred, contending that the proposition that one legislature could restrain the power of future legislatures from erecting bridges for ninety (and if ninety, a thousand) years, for a distance of ten miles (and if ten, an hundred), would hardly be assented to by any one.¹

¹ The obligation of contracts was still further discussed in *Curtis v. Whitney*, 13 Wallace, 68 (1871); *White v. Hart*, *Ibid.*, 646 (1871); *Pennsylvania College Cases*,

An interesting question is discussed in *Walker v. Whitehead*,¹ as to the extent to which laws, existing at the time and place of making a contract, and where it is to be performed, enter into, and form a part of it. It was held that wherever they affect the validity, construction, discharge, and enforcement of the contract, no subsequent legislation could alter them; that the ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment; and that though the States might change the remedy, if no substantial right secured by the contract be impaired, yet whenever such a result is produced by the act in question, to that extent it is void. This was followed by *Olcott v. County Board of Supervisors of Fond du Lac County*,² where it was held that if a contract when made was valid, under the Constitution and laws of a State as they had been previously enforced by its judicial tribunals, and as they were understood at the time, no subsequent act of the Judiciary or Legislature would be regarded by the Supreme Court of the United States as establishing its invalidity.

In the well-known case of *Gelpcke v. The City of Dubuque*,³ which involved the power of municipal corporations to borrow money upon coupon bonds in aid of a railroad for public purposes, as the main question, the doctrine of a general commercial jurisprudence was discussed and the right of the Federal Courts to consider questions not of a Federal character and arrive at their own conclusions, irrespective of State decisions, was fully established. The case has been viewed as a radical departure from precedent and principle,

Ibid., 190 (1871); *Tomlinson v. Jessup*, 15 Wallace, 454 (1872); *Walker v. Whitehead*, 16 Wallace, 314 (1872); *Olcott v. Supervisors*, *Ibid.*, 678 (1872).

¹ 16 Wallace, 314 (1872). ² 16 Wallace, 678 (1872). ³ 1 Wallace, 175 (1863).

due doubtless to a desire to prevent an effort on the part of the community concerned to evade the payment of its debts. But it has become a root as prolific of much-dreaded consequences, as that planted in *Swift v. Tyson*, from which it was an offshoot.

Mr. Justice Swayne, after quoting the earliest State decisions in force at the time of the making of the contract, said:

“It is urged that all these decisions have been overruled by the Supreme Court of the State, * * * and it is insisted that in cases involving the construction of a State law or Constitution, this Court is bound to follow the latest adjudication of the highest Court of the State. * * * It cannot be expected that this Court will follow every oscillation that may occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. * * * It is the settled rule of this Court to follow the decisions of State Courts, but there have been heretofore in the judicial history of this Court many exceptional cases. We shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the sacrifice.”

From this view Mr. Justice Miller dissented in a most powerful opinion, declaring that the doctrine now announced by the Court

“was a step in advance of any heretofore decided on this subject ; that advance is in the direction of a usurpation of the right which belongs to the State Courts to decide as a finality upon the construction of State Constitutions and State statutes. This invasion is made in a case where there is no pretence that the Constitution as thus construed is any infraction of the laws or Constitution of the United States.”

He pointed out that the decision was in conflict with the former decisions of the Court,¹ and declared:

¹ *Leffingwell v. Warren*, 2 Black, 599 (1862). See an admirable and exhaustive article entitled “Decisions of the Federal Courts on Questions of State Laws,” by Wm. M. Meigs, Esq., VIII Southern Law Review, 452, in which the departure, which

"The construction given to a State statute by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text. * * * If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this Court will follow the latest settled adjudications. For us to refuse to carry out this doctrine will lead to direct and unseemly conflicts with the Judiciary of the States."¹

The same question arose in *Meyer v. The City of Muscatine*,² and was again confirmed in *Havemeyer v. Iowa County*,³ where it was held that if the contract when made was valid by the Constitution and laws of the State as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the Legislature or Judiciary could impair its obligations, and the Supreme Court of the United States would not follow the most recent decisions of the State Supreme Courts. In vain did Mr. Justice Miller in his dissenting opinion declare that he had been compelled at Circuit to commit to jail over one hundred of the best citizens of Iowa for obeying an injunction issued by a competent Court of their own State, founded, as they conscientiously believed, on the true interpretation of their own statute,—an injunction, which in his private judgment, they were legally bound to obey. In vain did he lament the conflict of authority. In vain did Chief Justice

is now a wide one, from the doctrines expressed by Chief Justice Marshall in *Elmendorf v. Taylor*, 10 Wheaton, 152 (1825), and Mr. Justice Washington in *Golden v. Prince*, 3 Washington C. C. Rep., 314 (1814), is traced through all the cases.

¹ *Shelby v. Guy et al.*, 11 Wheaton, 361 (1826). *McCluny v. Silliman*, 3 Peters, 277 (1830). *Van Rensselaer v. Kearney*, 11 Howard, 297 (1850). *Webster v. Cooper*, 14 Howard, 504 (1852).

² 1 Wallace, 384 (1863).

³ 3 Wallace, 294 (1865). See also *Thomson v. Lee County*, 3 Wallace, 327 (1865). *Chicago v. Sheldon*, 9 Wallace, 50 (1869). *City v. Lamson*, *Ibid.*, 478 (1869).

Chase dissent. The doctrine was distinctly affirmed by Mr. Justice Swayne, sustained by a majority of the Court, that where a question involved in the construction of State statutes practically affects those remedies of creditors which are protected by the Constitution, the Supreme Court of the United States will exercise its own judgment on the meaning of the statutes irrespective of the decisions of the State Courts, and if it deems those decisions wrong will refuse to follow them. The same conclusion was reached in 1869 in the case of *Butz v. The City of Muscatine*,¹ and in *Township of Pine Grove v. Talcott*,² Mr. Justice Swayne again observing, "The question before us belongs to the domain of general jurisprudence. In this class of cases this Court is not bound by the judgments of the Courts of the States where the cases arise. It must hear and determine for itself."³

In still further illustration of the independence of the Federal Judiciary upon questions of general law, some striking features are presented by the case of *York County v. Central Railroad*,⁴ — in which it was held that the common law liability of a common carrier might be limited by special contract if such exemption does not cover loss by negligence or misconduct—and by the case of *Railroad Co. v. Lockwood*,⁵ where it was distinctly ruled by Mr. Justice Bradley in an opinion of surpassing power that a common carrier cannot stipulate for exemption from responsibility arising from the negligence

¹ 18 Wallace, 575 (1869).

² 19 Wallace, 666 (1873).

³ Compare this decision with *Walker v. Board of State Harbor Commissioners*, 17 Wallace, 648 (1873), where it was held that in the construction of State statutes affecting the title to real property, where no Federal question arises, this Court will follow the adjudications of the highest Court of the State.

⁴ 3 Wallace, 107 (1865). Affirming the case of *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard, 344 (1848).

⁵ 17 Wallace, 357 (1873).

of himself or his servants and that State decisions to the contrary will be swept aside.¹

Several interesting questions arose relating to Patents, in which the general principle was laid down that patents for inventions are not to be treated as mere monopolies, and, therefore, odious in the eye of the law; but they are to receive a liberal construction, and under a fair application of the rule *ut res magis valeat quam pereat*, the rights of the inventor are to be upheld and not destroyed.² The diverse sciences of jurisprudence and mechanics were brought with memorable ability to bear as sister lights upon the matter in issue; and the precincts of law were converted into an Academy.³

The Police Powers of the States were fully considered. It was held that where a party was indicted in a State Court for doing an act contrary to the statute of a State, and set up a license from the United States under one of its statutes, and the decision of the State Court was against the right claimed, the Supreme Court had jurisdiction under the 25th Section of the Judiciary Act. But the power of the United States was not to be stretched to the point of making an act forbidden by a State a matter of meritorious conduct, nor had Congress the right to license any one to violate the criminal laws of a State.⁴

In the important case of *Crandall v. The State of Nevada*,⁵ Mr. Justice Miller, in a most interesting opinion, held that a

¹This decision practically annuls the decisions of State Courts, notably those of the State of New York where such contracts are held to be valid, if suit should be brought in a Federal Court. See also *Forepaugh v. Delaware, Lackawanna & Western R. R. Co.*, 128 Penna. St. 217 (1889).

²*Turrill v. R. R. Co.*, 1 Wallace, 491 (1863). *Burr v. Duryee*, *Ibid.*, 531 (1863).

³*Case v. Brown*, 2 Wallace, 320 (1864).

⁴*Van Allen v. Assessors*, 3 Wallace, 573 (1865). *McGuire's case*, 3 Wallace, 302 (1865). The License Tax cases, 5 Wallace, 462 (1866). *Purvear v. Commonwealth*, 5 Wallace, 476 (1866).

⁵6 Wallace, 35 (1867).

State law imposing a capitation tax on passengers by railroad or stage-coach was unconstitutional, and that every citizen of the United States had a right to pass through a State without interruption as freely as in his own State. Relying upon the decisions of Marshall's day, he showed, by a most unanswerable course of reasoning, that the people of these United States constituted one nation; that they had a Government in which all were deeply interested; that this Government had necessarily a Capital established by law where its principal operations were conducted; that there sat its Legislature, composed of Senators and Representatives of the States and of the people of the States; that there resided the President, directing through thousands of agents the execution of the laws all over the land; that there was the seat of the Supreme Judicial authority of the nation to which all citizens had a right to resort in search of justice; that there were the Executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations; that the Federal power had a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union; that if this right were abandoned in any sense, however limited, upon the pleasure of a State, the Government itself might be overthrown by an obstruction to its exercise; that the citizen also had correlative rights; that he had a right to come to the seat of Government to assert any claim he might have, or to transact any business; that he had a right to seek its protection, to share its offices, or engage in administering them; to enjoy free access to its seaports, and that these rights were in their nature independent of the will of any State over whose soil he must pass in the exercise of them.

"We are all citizens," said he, "of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own States, and a tax, imposed by a State for entering its territory or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord, or mutual irritation, and they very clearly do not possess it."¹

The act was held void upon the ground that it conflicted with the Commerce clause of the Constitution.

Another illustration of the same principle is found in *Steamship Company v. Portwardens*,² in which it was held that an act providing that the Masters and Wardens of a port within a State should be entitled to receive, in addition to other fees, five dollars for every vessel arriving in port, was a regulation of commerce, and a duty on tonnage, and therefore unconstitutional and void.

So also in the case of the *State Freight Tax*,³ it was held that inter-State transportation of freight was not subject to State taxation, and that such a tax was a regulation of inter-State transportation, and therefore a regulation of commerce among the States, and hence unconstitutional and void. The opinion was delivered by Mr. Justice Strong, and all previous decisions of the Court were thoroughly and carefully reviewed.⁴

In contrast with these cases is the conclusion reached in *Osborne v. The City of Mobile*,⁵ in which an ordinance re-

¹See the Passenger Cases, 7 Howard, 283 (1849; *Brown v. State of Maryland*, 12 Wheaton, 419 (1827); *McCulloch v. Maryland*, 4 Wheaton, 316 (1819).

²6 Wallace 31 (1867).

³15 Wallace, 232 (1867).

⁴See *Almy v. State of California*, 24 Howard, 169 (1860). *Woodruff v. Parham*, 8 Wallace, 123 (1868).

⁵16 Wallace, 479 (1872).

quiring that every express company or railroad company, doing business in that city, should pay an annual license fee, and imposing a fine for the violation of its provisions, was sustained, notwithstanding the fact that some of the railroads had business extending beyond the limits of the State. It was held that the license tax was upon a business carried on entirely within local limits, and the Court agreed that a tax on business, carried on within a State and without discrimination between its citizens and the citizens of other States, might be Constitutionally imposed and collected.

Several other notable cases under the Commerce clause arose, as in *Gilman v. The City of Philadelphia*,¹ in which the right of a State to erect a bridge across a navigable stream was sustained, under the power of the States to exercise concurrent jurisdiction. It was held that as the power to authorize the building of bridges had not been taken from the States, they might exercise such authority until restrained by the action of Congress. The opinion was delivered by Mr. Justice Swayne, who said:

"The case stands before us as if the parties were the State of Pennsylvania and the United States. The river being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective by appropriate legislation, the reserve power of the State is plenary, and its exercise in good faith cannot be made the subject of review by this Court."

In the case of *Paul v. Virginia*² it was held that the law of a State requiring insurance companies of other States to enter security before they could issue policies in the State, was Constitutional, and that States might exclude a foreign corporation

¹ 3 Wallace, 713 (1865).

² 8 Wallace, 168 (1868).

entirely, or might exact such security for the performance of their contracts with their citizens, as in their judgment would best promote the public interest.¹

In *Railroad Co. v. Fuller*² a State statute which required that each railway company should annually fix its rates for the transportation of passengers and freights of different kinds was not unreasonable nor unconstitutional, inasmuch as it amounted merely to a police regulation which was fully within the power of the States.³

Two other cases belonging to this period deserve a passing notice. In the case of *Bradley v. Fisher*,⁴ the Court, in a most elaborate opinion by Mr. Justice Field, stated the correlative rights and duties of Court and Bar, and in *Bradwell v. The State of Illinois*⁵ held that a woman had no right to demand admission to the Bar. The power of a State to prescribe qualifications for admission to the Bar of its own Courts was unaffected by the Fourteenth Amendment, and the reasonableness or propriety of the rules that might be adopted could not be reviewed in the Supreme Court, the right to practice law in the State Courts not being such a privilege or immunity of a citizen of the United States as to be within the protection of the Amendment.⁶

¹ This conclusion was distinctly affirmed in *Ducat v. Chicago*, 10 Wallace, 410 (1870). *Ins. Co. v. Massachusetts*, *Ibid.*, 573 (1870). ² 17 Wallace, 560 (1873).

³ These police regulations had been considered in the License Tax Cases, 5 Wallace, 462 (1866). ⁴ 13 Wallace, 336 (1871). ⁵ 16 Wallace, 130 (1872).

⁶ In this connection it is interesting to note that up to the present time eight women have been admitted to practice in the Supreme Court of the United States under the terms of an Act of Congress:—Belva A. Lockwood, of Washington, D. C., March 3d, 1879; Laura De F. Gordon, of California, February 3d, 1883; Ada M. Bittenbender, of Lincoln, Neb., October 15th, 1888; Carrie B. Kilgore, of Philadelphia, Pa., January 8th, 1890; Clara S. Folte, of San Diego, Cal., March 4th, 1890; Lelia E. Santalle, of Boston, Mass., Emma M. Gillett, of Washington, D. C., April 8th, 1890; Marilla M. Ricker, of Washington, D. C., May 11th, 1891.

CHAPTER XVIII.

THE SEVENTH EPOCH: 1870-1890: THE CLIMAX OF FEDERALISM: FINANCIAL LEGISLATION OF CONGRESS: THE EARLY LEGAL TENDER CASES: *BRONSON v. RODES*: *BUTLER v. HORWITZ*: *HEPBURN v. GRISWOLD*: THE UNCONSTITUTIONALITY OF PAPER MONEY DECLARED: CHANGES IN THE COMPOSITION OF THE COURT: THE LATER LEGAL TENDER CASES: *KNOX v. LEE*: *PARKER v. DAVIS*: DOCTRINE OF *HEPBURN v. GRISWOLD* REVERSED: THE CONSTITUTIONALITY OF PAPER MONEY ESTABLISHED: THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS: UNEXPECTED NARROWNESS OF CONSTRUCTION: THE SLAUGHTER HOUSE CASES; SKETCHES OF JUSTICES STRONG, BRADLEY AND HUNT.

WE now enter the seventh and last epoch in the history of the Court during the first century of its existence,—an epoch full of interesting developments of power, the most important political and moral achievements, marked by an enormous expansion of National authority, moderated but not restrained by an unexpected strictness of construction of the latest Amendments of the Constitution.

Our great Civil Strife had left among its legacies legislation relating to the finances which, although prompted by patriotic motives, had been adopted under the pressure and exigencies of war, and was still debated and perhaps debatable. Problems of the gravest character arose in relation to the Constitutional authority of Congress, and in the final adjudication and settlement of these the summit of Federalism was reached.

The downfall of slavery and the bestowal of the franchise upon the recently emancipated race, the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, by which the rights acquired and the results determined by the Civil War were placed under the guardianship of the Federal Government, gave birth to questions far-reaching and all-pervading in their consequences, profoundly interesting to mankind and of radical importance in their bearing upon the relation of the United States to the several States of the Union.

The right of the Nation to protect her own officers, judicial and ministerial, in the discharge of their duty, against personal violence and assassination, and the consequent extension of the Federal Judicial authority, by way of removal from State Courts, in cases both civil and criminal; the awakened moral indignation over the crime and shame of polygamy; a new realization of our duties towards our Indian wards; the conviction that involuntary political assessments levied upon office-holders for the purposes of a campaign were both tyrannical and corrupting; a clearer appreciation of the relations of the States in matters of commerce; the employment of the telegraph as an instrument of familiar communication,—these and a thousand cases of like import and character have evoked judicial powers of the highest order of excellence and have welded together the influences which have made us in truth a Nation. The services performed by the Court during the past twenty years are not of less importance to American nationality than the victories of the armies in the field, nor is its fame, honestly earned, of less value or less worthy of remembrance, in the estimation of every thoughtful lover of our institutions, than the brilliant reputations of the orators, the statesmen and the soldiers of the Civil War. The interests and the destinies of unnumbered

generations will be affected for weal or for woe by the work of the Court during this period.¹

The most important and notable of the cases which arose,—certainly among the most celebrated that have ever been decided,—were those known as the “Legal Tender Cases,” which carried the implied powers of the Federal Government to an altitude never before reached, and the correctness of which has been seriously questioned by some of the highest legal authorities, notwithstanding the final decisions of the Court sustaining the Constitutional powers involved. The cases are remarkable, too, as presenting the first instance in the history of the tribunal of a solemn reversal by the Court of its former position, upon a question so fundamental, and a distinct overruling of its own judgment upon a matter solemnly argued and solemnly adjudicated. The action of the Court attracted wide-spread attention both at home and abroad, and has been thought to affect public confidence in the tribunal.²

¹Two shadows rest upon its reputation,—the reversal of its own judgment in the Legal Tender Cases and the participation of five of its members in the work of the Electoral Commission. The time has not yet arrived for a consideration of either action which would be deemed free from prejudice.

²Mr. Bryce says: “Two of its later acts are thought by some to have affected public confidence. One of these was the reversal, first in 1871, and again upon broader but not inconsistent grounds, in 1884, of the decision given in 1870, which declared invalid the Act of Congress making Government paper a legal tender for debts. . . . Be the decision right or wrong, a point on which high authorities are still divided, the reversal by the highest Court in the land of its own previous decision may have tended to unsettle men’s reliance on the stability of the law; while the manner of the earlier reversal, following as it did on the creation of a new Judgeship, and the appointment of two Justices, both known to be in favor of the view which the majority of the Court had just disproved, disclosed a weak point in the constitution of the tribunal which may some day prove fatal to its usefulness.” *The American Commonwealth*, Vol. I, Part I, Chap. 24, p. 263. See Pamphlets of Mr. George Bancroft and Mr. R. C. McMurtrie, an article in “*The American Law Re-*

Prior to 1862 no statesman or jurist had asserted that Congress had, under the Constitution, the power of making anything but gold or silver coin a legal tender. The acts of Congress of 25th of February, 1862, 11th of July, 1862, and 3d of March, 1863,¹ declared that the notes issued thereunder should be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, &c." Under these Acts it had been decided that neither taxes imposed by State authority² nor private obligations payable by their terms in gold or silver coin, were debts, within the terms of the Acts of Congress, dischargeable by payment in legal tender notes.³

The first case was that of *Bronson v. Rodes*, brought upon a writ of error from the Court of Appeals of the State of New York, and it appeared that the contract sued upon stipulated for the payment of gold and silver coin, lawful money of the United States, with interest also in coin. A tender had been made in United States notes to an amount nominally equal to the principal and interest of the debt, which was refused, and the question arose whether such tender was valid.

The case was elaborately argued by Mr. Townsend and Mr. Clarkson N. Potter, for the plaintiff in error, by Mr. Evarts, as Attorney-General of the United States, and Mr. Sherman S. Rogers, for the defendant in error, and the opin-

view," Vol. IV, p. 768, by Mr. Justice O. W. Holmes, and an article in "The Harvard Law Review," for May, 1887, Vol. I, p. 73, by Professor James B. Thayer, of the Harvard Law School.

¹ 12 Statutes, 345, 532, 709.

² *Lane County v. Oregon*, 7 Wallace, 71 (1868). See also *Hagar v. Reclamation District*, 111 U. S., 701 (1883).

³ *Bronson v. Rodes*, 7 Wallace, 229, (1868); *Butler v. Horwitz*, *Ibid.*, 258 (1868); *Bronson v. Kimpton*, 8 Wallace 444 (1869).

ion was delivered by Chief Justice Chase, who, after a most elaborate review of the Coinage and Currency Acts, arrived at the conclusion that express contracts to pay coin dollars can only be satisfied by the payment of coin dollars, and that they are not "debts" which may be satisfied by the tender of United States notes. Justices Swayne and Davis concurred in separate opinions because of the language of the contracts. Mr. Justice Miller dissented.

A similar result was reached in the cases of *Butler v. Horwitz*¹ and *Bronson v. Kimpton*.² Mr. Justice Miller again dissented: he had no doubt that it was intended by the Acts of Congress to make the notes of the United States a legal tender for all private debts due, or which might become due, on contracts then in existence, without regard to the intent of the parties on that point.

In none of these cases was the Constitutionality of the Acts considered. That question arose in the later case of *Hepburn v. Griswold*,³ argued by the same leading counsel at great length and with masterly ability, and the further question was mooted whether the Act of Congress in relation to legal tenders applied to debts contracted before, as well as after enactment. In the case at bar, the contract itself antedated the Act of Congress. The opinion was delivered by Chief Justice Chase, and was concurred in by Justices Nelson, Clifford, Grier and Field, and dissented from by Mr. Justice Miller for himself and Justices Swayne and Davis. After reaffirming the conclusions reached in *Bronson v. Rodes* and like cases, the Chief Justice said:

¹ 7 Wallace, 258 (1868). Contracts expressly payable in "gold and silver dollars," or in "specie," can only be satisfied by payment in coin. The Legal Tender Acts do not apply to them. *Trebilcock v. Wilson*, 12 Wallace, 687 (1872).

² 8 Wallace, 444 (1869).

³ 8 Wallace, 603 (1869).

"We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the Act. We are thus brought to the question whether Congress has power to make notes issued under its authority a legal tender in payment of debts which, when contracted, were payable by law in gold or silver coin. . . . It has not been maintained in argument, nor indeed would any one, however slightly conversant with Constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts. We must inquire, then, whether this can be done in the exercise of an implied power."

He then considered the language of Chief Justice Marshall in the case of *McCulloch v. State of Maryland*, as establishing a rule for determining whether a legislative enactment can be supported as an exercise of implied power, and after quoting the words: "*Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the spirit and letter of the Constitution, are Constitutional,*" arrived at the conclusion that it must be taken as finally settled, so far as judicial decision could settle anything, that the words all laws 'necessary and proper' for carrying into execution powers expressly granted or vested, have in the Constitution a sense equivalent to that of the words, "*Laws, not absolutely necessary indeed, but appropriate, plainly adapted to Constitutional and legitimate ends; laws not prohibited but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects entrusted to the Government.*" The question then resolved itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?" The answer he did not con-

sider doubtful. The argument proved too much. It carried the doctrine of implied powers very far beyond any extent hitherto given to it. It asserted that whatever in any degree promoted an end within the scope of a general power, whether in the correct sense of the word "appropriate" or not, might be done in the exercise of an implied power. This proposition, he insisted, could not be maintained. In reply to the argument that this was a question for Congress to determine, he answered that the admission of a legislative power to determine finally what powers have a described relation as means to the execution of other powers plainly granted, and then to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have this relation, would completely change the nature of American government.

"It would convert the government which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the Executive and Judicial from the Legislative authority. It would obliterate every criterion which this Court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are Constitutional or unconstitutional."

And by a most elaborate course of reasoning he held that although the Legislature had unrestricted choice among means appropriate, yet no power could be derived by implication from any express power to enact laws as means for carrying it into execution, unless such laws should come within the description of Marshall, and that the making of notes or bills of credit a legal tender in payment of pre-existing debts, was not a means appropriate or plainly adapted, or really calculated to carry into effect any express power vested in Congress; that it was inconsistent with the spirit of the Consti-

tution, and was in effect prohibited by the Constitution. Therefore, the Legal Tender Acts, so far as they applied to debts contracted before their passage, were unconstitutional and unwarranted.

In his dissenting opinion, Mr. Justice Miller divided the provisions of the Constitution relating to the function of legislation, into those which conferred legislative powers on Congress; those which prohibited the exercise of legislative powers by Congress; and those which prohibited the States from exercising certain legislative powers. He subdivided the first into positive and auxiliary powers, or, as more commonly called, the express and the implied powers. As instances of the former class, he cited the power to borrow money, to raise and support armies, to coin money, and to regulate the value thereof. The implied or auxiliary powers he contended, were founded largely on the general provision which closed the enumeration of powers granted in express terms, by the declaration that Congress should have power also to make all laws that would be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. He pointed out that although the Constitution prohibited any State from coining money, emitting bills of credit, or making anything else but gold and silver coin a payment of debts, yet no such prohibition was placed upon the power of Congress on this subject, while on the contrary, Congress was expressly authorized to coin money and to regulate the value thereof, and of all foreign coin, and to punish the counterfeiting of such coin, and of the securities of the United States. He insisted that this latter clause, when fairly construed, conferred the power to make the securities of the United States a legal tender in

payment of debts. In considering the scope of the words "necessary and proper," he declared that the necessity need not be absolute, nor need the adaptation of the means to the end be unquestioned. On the contrary, as Chief Justice Marshall had said, "a thing may be necessary, very necessary, absolutely or indispensably necessary," and that the word, like all others, was viewed in various senses, and in its construction, the subject, context, and the intention of the persons using them, were all to be taken into view.

He then pointed out that the power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defence and general welfare, were all express powers distinctly and specifically granted in separate clauses of the Constitution, and that when Congress was called on to devise some new means of borrowing money on the credit of the United States for the purpose of meeting the peril incident to a state of civil war that the Legal Tender Acts furnished instantly a means of paying the soldiers in the field, and of filling the coffers of the commissary and quartermaster; that they further furnished a medium for the payment of private debts as well as public, at a time when gold was being rapidly withdrawn from circulation, and the State bank currency was becoming worthless; that they furnished the means to the capitalist of buying the bonds of the Government, that they stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind. He therefore reached the conclusion that not only did the necessity in the Constitutional sense of the term exist, but that the means adopted bore to the necessity a proper and Constitutional relation. He also held that where

there was a choice of means, the selection rested with Congress, and not with the Court, and that if the Act to be considered was in any sense essential to the execution of an acknowledged power; the degree of that necessity was for the Legislature, and not for the Court to determine. He therefore expressed the opinion that Congress had acted within the scope of its authority, and that he must hold the law to be Constitutional, and dissent from the opinion of the majority of the Court. In this conclusion Mr. Justice Swayne and Mr. Justice Davis concurred. Several other cases, in one of which Mr. Benjamin R. Curtis appeared as counsel, depending upon the same question, were ruled in the manner indicated by the judgment of the majority of the Court.¹

The utmost excitement prevailed in the public mind immediately after the announcement of the decision, and it was not long before it became generally understood that an effort would be made to secure a reconsideration of the judgment.²

¹ Broderick's Excr. v. Magraw, 8 Wallace, 639 (1869); Willard v. Tayloe, 8 Wallace, 557 (1869). See also Thompson v. Riggs, 5 Wallace, 663 (1866).

² A charge has been made that the Supreme Court was packed for the purpose, but examination of a few simple facts and dates shows it to be without foundation, except so far as political prejudice and dissatisfaction with the final result may unite to pervert the evidence. The charge is based upon the common fallacy: *post hoc, ergo propter hoc*.

The case of Hepburn v. Griswold had been argued for the first time at the December term of 1867 by private counsel. Subsequently, Mr. Stanbery, then Attorney-General of the United States, suggesting the great public importance of the question, secured a re-argument, and the case was again argued in 1868 by Mr. B. R. Curtis, Mr. Evarts and Mr. Potter. Four other cases involving similar questions were also heard. While the question was still undecided, and ten months before the decision was announced, Congress had passed an Act on the 10th of April, 1869, to take effect on the first Monday of the following December, authorizing the appointment of an additional Justice of the Supreme Court, and at the same time the Act of 23d July, 1866, reducing the number of Associate Justices from nine to six by not filling vacancies as they should occur, was repealed. At this time the deaths of Justices Catron and Wayne had reduced the number of Associates to seven. The

An Act of Congress had been passed on the 10th of April, 1869, to take effect on the first Monday of the succeeding December, authorizing the appointment of an additional Justice of the Supreme Court. A vacancy also existed through the resignation of Mr. Justice Grier. The decision in

effect of the Act of 1869 was to make the Court consist of a Chief Justice and eight Associates. On the 15th December, 1869, two weeks after the new law went into effect and nearly two months before the decision in *Hepburn v. Griswold* was announced, Mr. Justice Grier resigned, his resignation to take effect in the following February. Mr. Stanton was commissioned as his successor on the 20th of December, 1869, but died four days afterwards. Several ineffectual efforts were made to fill his place, but the nominations failed of confirmation. On the 7th February, 1870, the decision was announced, and at this time, therefore, there were two existing vacancies in the Court, one under the Act of 1869, the other through the resignation of Mr. Justice Grier. *On the very day of the decision*—7th February, 1870—the names of Joseph P. Bradley and William Strong were sent to the Senate in that order without specifying to which vacancy either was to be assigned. It is preposterous to assert that before the decision of the Court was an hour old and its effects could be considered, President Grant had matured a well-digested plan, with carefully selected instruments, to accomplish a reversal of a solemn judgment—an event unheard of and unparalleled at that time—by filling vacancies created months before the decision was known, and which would have been filled by others than those finally chosen had not death and disagreement between the Senate and the President deprived the latter of his original choice.

As to the well-known views of Judge Strong, who had been Lincoln's choice for Chief Justice, and who had decided the cases of *Shollenberger v. Brinton*, 52 Pa. St., 9, in 1866, sustaining the legal tender features of the Acts of Congress, it is to be remarked that the majority of the Judges of the Supreme Courts of fifteen States in the Union had pronounced similar views, and in only two States—New Jersey and Kentucky—had final decisions been rendered adverse to the validity of the legal tender provisions of the Acts, *Martin v. Martin*, 20 N. J. Eq., 421 (1870); *Griswold v. Hepburn*, 2 Duvall, (Ky.) 20 (1865). The State decisions affirming the power were *George v. Concord*, 45 N. H., 434 (1864); *Carpenter v. Bank*, 39 Vt., 46 (1866); *Essex Co. v. Pacific Mills*, 14 Allen (Mass.) 389 (1867); *Metropolitan Bank v. Van Dyck*, 27 N. Y., 400 (1863); *Legal Tender Cases*, 52 Pa. St., 9 (1866); *Thayer v. Hedges*, 23 Ind., 141 (1864); *Van Husen v. Kanouse*, 13 Mich., 303 (1865); *Breitenbach v. Turner*, 18 Wis., 140 (1864); *O'Neil v. McKewn*, 1 S. C. 147 (1869); *Wills v. Allison*, 4 Heiskell (Tenn.) 385 (1871); *Breen v. Dewey*, 16 Minn., 136 (1870); *Hintrager v. Bates*, 18 Iowa, 174 (1864); *Riddlesbarger v. McDaniel*, 38 Mo., 138 (1866); *Verges v. Giboney*, *Ibid.*, 458 (1866); *Cox v. Smith*, 1 Nev. 161 (1865); *Lick v. Faulkner*, 25 Cal., 404 (1864).

Hepburn v. Griswold had been pronounced upon the 7th of February, 1870. On the same day the names of Mr. Bradley and Mr. Strong were sent to the Senate. On the 14th of March of that year Mr. Justice Strong became a member of the Court, having been commissioned on the 18th of February, and on the 21st of March Mr. Justice Bradley was also commissioned. Shortly after this a motion was made by the Attorney-General of the United States, that two cases, those of *Lathams v. United States*, and *Demming v. United States*, brought by appeal from the Court of Claims, should be set down for argument, and that the legal tender question might be reconsidered. These cases were subsequently withdrawn from the record, but the question again arose in *Knox v. Lee* and *Parker v. Davis*,¹ and the whole question was again opened for the consideration of the Court, and argued with the utmost elaboration. The former decision in *Hepburn v. Griswold* was distinctly overruled, and it was held that the Legal Tender Acts were Constitutional and valid, both as to contracts made before and since their passage. The opinion of the Court was delivered by Mr. Justice Strong, who pointed out that if the Acts were held to be invalid as applicable to debts incurred or transactions which had taken place since their enactment, the decision would cause throughout the country great business derangement, wide-spread distress, and the rankest injustice. Debts which had been contracted since February 25th, 1862, constituted by far the greatest portion of the existing indebtedness of the country; they had been contracted in view of the Acts of Congress declaring Treasury notes a legal tender, and, in reliance upon that declaration, men had bought and sold, borrowed and lent, and assumed every variety of obligations, contemplating that payment might

¹ 12 Wallace, 457 (1870).

be made with such notes. If by the decision it was established that these debts and obligations could be discharged only by gold coin; if, contrary to the expectations of all parties to these contracts, legal tender notes were rendered valueless, the Government would at once become an instrument of the grossest injustice, and all debtors would be loaded with an obligation which it was never contemplated they should assume; a large percentage would be added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress and bankruptcy might be expected.

“The consequences of which we have spoken, serious as they are, must be expected if there is a clear incompatibility between the Constitution and the Legal Tender Acts; but we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the Government demands that the Judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution.”

He then entered upon a most elaborate investigation of the nature and extent of the powers conferred by the Constitution upon Congress, keeping in view the objects for which those powers were granted, and deduced, as a necessary inference from the war powers, the conclusion that the provision which made Treasury notes a legal tender for the payment of all debts, other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the Government, nor was it forbidden by the letter or spirit of the Constitution. He said:

“In so holding, we overrule so much of what was decided in *Hepburn v. Griswold* as ruled the acts unwarranted by the Constitution so

far as they apply to contracts made before their enactment. That case was decided by a divided Court, and by a Court having a less number of Judges than the law then in existence provided this Court shall have. These cases have been heard before a full Court, and they have received our most careful consideration. The questions involved are Constitutional questions of the most vital importance to the Government and to the public at large. We have been in the habit of treating cases involving a consideration of Constitutional power differently from those which concern merely private rights. We are not accustomed to hear them in the absence of a full Court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error, and it is no unprecedented thing in Courts of last resort, both in this country and England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it our duty so to decide and affirm both these judgments."

A most vigorous concurring opinion was read by Mr. Justice Bradley, in which he stated that he regarded the question of power as so important to the stability of the Government, that he could not acquiesce in the decision of *Hepburn v. Griswold*.

"I cannot consent," said he, "that the Government should be deprived of one of its just powers by a decision made at the time and under the circumstances in which that decision was made. On a question relating to the power of the Government where I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable unanimity, and acquiesced in by the country. Where the decision is recent, and is only made by a bare majority of the Court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the Court are dissatisfied with the former decision. And in this case, with all deference and respect for the former judgment

of the Court, I am so fully convinced that it was erroneous and prejudicial to the rights, interests and safety of the General Government that I for one have no hesitation in reviewing and overruling it. It should be remembered that this Court at the very term in which, and within a few weeks after the decision in *Hepburn v. Griswold* was delivered, when the vacancies on the bench were filled, determined to hear the question re-argued. This fact must necessarily have had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal."

Chief Justice Chase pronounced a most elaborate dissenting opinion, in which he again traversed the ground covered by his opinion in *Hepburn v. Griswold*, and insisted that the error of the minority Judges in that case was in urging as a justification of legal tenders considerations pertinent to the issue of United States notes.

"The real question," said he, "is, was the making (treasury notes) a legal tender a necessary means to the execution of the power to borrow money. If the notes would circulate as well without as with this quality, it is idle to urge the plea of such necessity; but the circulation of the notes was amply provided for by making them receivable for all National taxes, all dues to the United States, and all loans. This was the provision relied upon for the purpose by the Secretary (of the Treasury) when the Bill was first prepared, and his reflections since have convinced him that it was sufficient. Nobody could pay a tax, or any debt, or buy a bond without using these notes. As the notes, not being immediately redeemable, would undoubtedly be cheaper than coin, they would be preferred by debtors and purchasers. They would thus, by the universal law of trade, pass into general circulation. As long as they were maintained by the Government at or near the par value of specie, they would be accepted in payment of all dues, private as well as public. . . . Now does making the notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the Government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent.

This certainly does not improve the value of its notes. It is an element of depreciation. . . . We have no hesitation, therefore, in declaring our conviction that the making of these notes a legal tender was not a necessary or proper means to the carrying on of the war, or to the exercise of any express power of the Government."

He insisted further that the law violated an express provision of the Constitution, and the spirit, if not the letter, of the whole instrument; that, inasmuch as the Fifth Amendment provided that no person should be deprived of life, liberty or property without compensation or due process of law, the Acts, by operating directly upon the relations of debtor and creditor, violated that fundamental principle of all just legislation, that the Legislature should not take the property of A and give it to B. "It says that B, who has purchased a farm of A, for a certain price, may keep the farm without paying for it, if he will only tender certain notes which may bear some proportion to the price, or be even worthless. It seems to us that this is a manifest violation of this clause of the Constitution." He also insisted that the acts impaired the obligation of contracts, and closed his opinion with these words:

"The present majority of the Court say that legal tender notes 'have become the universal measure of values,' and they hold that the legislation of Congress substituting such measures for coin by making the notes a legal tender in payment, is warranted by the Constitution. But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of Courts avail anything in determining the meaning of the Constitution, it seems impossible to doubt that the power to coin money is a power to establish a uniform standard of value, and that no other power to establish such a standard by making notes a legal tender is conferred upon Congress by the Constitution."

Mr. Justice Clifford, in his dissenting opinion, entered into a most elaborate examination of the meaning of the word "money" in the Constitutional sense, and reviewed all the Coinage Acts in detail, entering most exhaustively into a consideration of economic and financial views, and citing from the writings of famous publicists, both domestic and foreign.

Mr. Justice Field also dissented in an able opinion, asserting that it was plain that the policy of maintaining a fixed and uniform standard could not be carried out, and that a fixed and uniform metallic standard of value throughout the United States could not be maintained so long as any other standard was adopted which of itself had no intrinsic value and was forever fluctuating and uncertain. He admitted that the measure, the validity of which was called in question, was passed in the midst of a gigantic rebellion, when even the bravest heart sometimes doubted the safety of the Republic, and that the patriotic men who adopted it did so under the conviction that it would increase the ability of the Government to obtain funds and supplies, and thus advance the National cause; but he declared that, sitting as a judicial officer, and bound to compare every law enacted by Congress with the greater law enacted by the people, and being unable to reconcile the measure in question with that fundamental law, he could not hesitate to pronounce it, in his judgment, unconstitutional and void.

"In the discussions which have attended this subject of legal tender," said he, "there has been at times what seemed to me to be a covert intimation that opposition to the measure in question was the expression of a spirit not altogether favorable to the cause in the interest of which that measure was adopted. All such intimations I repel with all the energy I can express. I do not yield to any one in honoring

and reverencing the noble and patriotic men who were in the councils of the Nation during the terrible struggle with the Rebellion. To them belong the greatest of all glories in our history,—that of having saved the Union, and that of having emancipated a race. For these results they will be remembered and honored so long as the English language is spoken or read among men. But I do not admit that a blind approval of every measure which they may have thought essential to put down the Rebellion is any evidence of loyalty to the country. The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our great Master when he said to his disciples: ‘If ye love me, keep my commandments.’”¹

We have dwelt at length upon the features of this great judicial debate, not only because of its intrinsic interest and the fundamental character of the question involved, but because it displays in the most convincing manner the talents of the great jurists who participated in it, and vindicates their title to be regarded as among the ablest of the many distinguished men who have illustrated our national jurisprudence.

Another question of profound and lasting importance, involving the construction of the Thirteenth, Fourteenth and Fifteenth Amendments, arose in the famous *Slaughter House Cases*.² They grew out of an Act of the Legislature of Louisiana, passed since she had been recognized as a State of the Union, after the close of the Civil War. The Slaughter House Company was a corporation created by statute, possessing the exclusive privilege of establishing and maintaining stock-yards and landing-places and slaughter-houses for the city of New Orleans, in which all stock must be landed,

¹ See also *Dooly v. Smith*, 13 Wallace, 604 (1871). Mr. Justice Field’s dissenting opinion in *Bigler v. Waller*, 14 Wallace, 297 (1871). *Railroad Co. v. Johnson*, 15 Wallace, 195 (1872).

² 16 Wallace, 36 (1872).

and all animals intended for food must be slaughtered. Regulations for the maintenance of the slaughter house were fully and completely detailed, and the corporation was required to provide all the conveniences necessary for that purpose, and restrictions upon the price charged therefor were stated. The butchers of the city considered this monopoly an invasion of their personal rights, particularly under the Amendments, and brought suit to restrain the exercise of this authority by the Slaughter House Company. The case finally reached the Supreme Court of the United States, and was twice argued by Mr. John A. Campbell, formerly an Associate Justice of the Supreme Court, in a manner which excited the utmost admiration for the extraordinary ability, learning, ingenuity and eloquence displayed. On the other side appeared Senator Carpenter, of Wisconsin. The opinion of the Court was delivered by Mr. Justice Miller, putting a much more limited interpretation upon the Amendments, and particularly the Thirteenth, than had been expected. It was asserted that an examination of the history of the causes which led to the adoption of the Amendments showed that their main purpose was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery, and that while the Thirteenth Amendment was intended primarily to abolish African slavery, it equally forbade Mexican peonage or the Chinese Coolie trade, when they amounted to slavery or involuntary servitude; that the use of the word "servitude" was intended to prevent all forms of involuntary servitude of whatever class or name; that the first clause of the Fourteenth Amendment was primarily intended to confer citizenship on the Negro race, and secondly to give a definition of citizenship of the United

States and citizenship of the State; that it recognized a distinction between them, and that the second clause protected from the hostile legislation of the States the privileges and immunities of the citizens of the United States, as distinguished from the privileges and immunities of the citizens of the States. From this reasoning the conclusion was somewhat unexpected. It was held that the law in question was a police regulation for the health and comfort of the people entirely within the power of the State Legislatures, and unaffected either by the Constitution of the United States previous to the adoption of the Amendments, or since.

From this opinion Mr. Justice Field and Mr. Justice Bradley dissented in the most energetic terms, holding that the Amendments were intended for whites as well as blacks; that they conferred upon all alike, if born in the United States or naturalized, citizenship of the United States, making that the primary status of citizenship, and citizenship of the States only secondary, depending on mere residence; that the privileges and immunities of citizens, which States were forbidden to abridge, were not merely those arising out of the Constitution itself, such as voting for Representatives, etc., but all fundamental rights of persons or property usually regarded as secured in all free countries, as evinced by the subsequent provision against depriving any person of life, liberty or property without due process of law, or denying to any person the equal protection of the laws; that amongst these privileges and immunities was the right of labor, the pursuit of happiness, and following any of the ordinary employments or callings of life, subject to reasonable regulations; that the grant of a monopoly of one of these employments to a favored few, to the exclusion of all the rest of the community, was an abridgement of the rights of the latter, and an abuse of legis-

lative authority; and that it was a mere pretence to call the law in question a police regulation, as it was well known to be one of those pernicious acts of fraud and oppression by which irresponsible legislatures robbed and plundered the Southern people at the close of the Civil War.

The decision of the majority was severely criticised, and in its defence Mr. Justice Miller, who pronounced the opinion, and who always referred to it in terms of pride, has said:¹

“Although this decision did not meet the approval of four out of nine of the Judges, on some points on which it rested, yet public sentiment, as found in the Press, and in the universal acquiescence with which it was received, accepted it with great unanimity, and although there were intimations that in the legislative branches of the Government the opinion would be reviewed and criticised unfavorably, yet no such thing has occurred in the fifteen years which have elapsed since it was delivered, and while the question of the construction of these Amendments, and particularly the Fourteenth, has often been before the Supreme Court of the United States, no attempt to overrule or disregard this elementary decision of the effect of the three new Constitutional Amendments upon the relations of the State Governments to the Federal Government has been made; and it may be considered now as settled that, with the exception of the specific provisions in them for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the States for that purpose, with the addition of the powers of the General Government to enforce those provisions, no substantial change has been made. The necessity of the great powers conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States, and their power to regulate their domestic affairs, remain as the great features of our complex form of government.”

The decision stands as a bulwark of State authority, the

¹ See Address delivered before the Alumni of the Law Department of Michigan on the “Supreme Court of the United States” at the Semi-Centennial Celebration of the University, June 29, 1887.

most important and substantial of those erected since the days of Taney.¹

During the period of the decisions which have been reviewed in this chapter, several changes took place upon the bench, which it is proper to notice. William Strong of Pennsylvania, was commissioned as an Associate Justice upon the 18th of February, 1870. In writing to President Grant he said, "You have done me great honor. I shall ever gratefully remember your kindness. A seat in the Supreme Court would satisfy all my ambition, except ambition to discharge its duties well."

His grandfather, Adonijah Strong, was a lawyer, and served in the Revolutionary Army as Commissary General. His father, the Rev. William L. Strong, was a Congregational minister. The future Associate Justice was born at Somers, Tolland County, Connecticut, upon the 6th of May, 1808, and was the eldest of eleven children. He was educated at the Plainfield Academy, graduated from Yale in 1828, and while teaching school in Burlington, N. J., studied law under

¹Mr. John S. Wise, of Virginia, has expressed himself in the following glowing terms: "I said that we owed more to the American lawyer than to the American soldier, and I repeat it; for not all the victories of Grant, or all the marches of Sherman, have by brute force done as much to bulwark this people with the inestimable blessings of Constitutional liberty as that one decision of the Supreme Court in the Slaughter House Cases, declaring what of their ancient liberties remained. That decision, worthy to live through all time for its masterly exposition of what the war did and did not accomplish, did more than all the battles of the Union to bring order out of chaos. . . . When war had ceased, when blood was stanchd, when the victor stood above his vanquished foe with drawn sword, the Supreme Court of this Nation, when it spoke in the great decision of the Slaughter House Cases, planted its foot and said, 'This victory is not an annihilation of State Sovereignty, but a just interpretation of Federal power.'" Speech of Mr. Wise in reply to the toast "The American Lawyer," at the Breakfast to the Justices of the Supreme Court of the United States by the Bar of Philadelphia, September 15th, 1887.

Garrett D. Wall as a preceptor, completing his legal studies by a six months' course in the Yale Law School. Having determined to practice law in Pennsylvania, he was admitted to the Bar in that State in 1832, and settled at Reading, acquiring the German language, which he spoke with fluency, and soon took high rank as a lawyer. In 1846 he became a candidate for Congress, and was twice elected on the Democratic ticket, serving from 1847 to 1851. During his second term, he was appointed chairman of the Committee on Elections. Declining a third nomination, he retired from active participation in politics, but upon the outbreak of the Civil War, though then occupying high judicial station, gave all his support and influence in aid of the Government. In 1857 he was elected an Associate Justice of the Supreme Court of Pennsylvania, and filled that high office for the term of eleven years. Attaining distinguished prominence as an able and upright judge, his opinions on all questions of law, but particularly those affecting real estate, the interpretation of wills, and the duties and liabilities of trustees, are highly valued. Clear, precise, and vigorous in style, accurate in his application of principles and of abundant and varied learning, he ranked among the foremost jurists of the State.

In 1868 he resigned his seat upon the bench, and opened an office in Philadelphia, acquiring almost immediately a large and lucrative practice. Two years later, he was appointed an Associate Justice of the Supreme Court. It is not generally known that President Lincoln had selected him for the vacancy created by the death of Chief Justice Taney, but was obliged to forego his personal preferences to parry the Presidential aspirations of Mr. Chase.

Careful in the investigation of facts, discriminating nicely in the application of principles, of sound judgment as a critic,



W. Strong ~

candid in consultation, making suggestions which were always worthy of attention, but never gave offence, Mr. Justice Strong became a leader in the highest tribunal of the Nation and a firm supporter of the dignity and authority of the Court. Of his opinions, those on the Captured and Abandoned Property Act,¹ in the Legal Tender cases,² the State Freight Tax case,³ the Confiscation cases,⁴ the Civil Rights cases,⁵ and particularly the case of *Tennessee v. Davis*,⁶ exhibit, in a high degree, remarkable power of analysis, logical arrangement of matter, and eloquence of statement. He owed much, he was often heard to say, to a familiar acquaintance with the works of John Locke. Upon certain questions his convictions were so strong, stubborn in fact, as to amount to what his critics pronounced to be prejudices, while his friends admired the boldness of his views, and the tenacity with which he adhered to them. He was a member of the Electoral Commission, and his opinion sustained that of the majority of the Court, holding that Congress had no power to canvass a State election for Presidential Electors.

Under the provisions of the Revised Statutes, he resigned the office of Associate Justice in 1880, in the full maturity of his great powers "with his natural force unabated." The Bar of the Supreme Court expressed their cordial recognition of his profound learning, ripe wisdom, sincere anxiety to do justice, rigid impartiality, absolute independence, and unfailing courtesy and patience, while his associates on the bench bore willing witness to his purity of character as a man, and his eminent ability as a Judge.

¹ *Bigelow v. Forrest*, 9 Wallace 339 (1869).

² *Knox v. Lee*, *Parker v. Davis*, 12 Wallace, 457 (1870).

³ 15 Wallace, 232 (1872).

⁴ 7 Wallace, 454 (1868).

⁵ 109 U. S., 3 (1883).

⁶ 100 U. S., 257 (1879).

Besides his official and professional labors, he has taken an active part in the councils of the Presbyterian Church, of which he is a distinguished member. For many years he was President of the American Tract Society and the American Sunday School Union, and a warm supporter of benevolent enterprises. He has delivered many public addresses, and contributed to magazines and reviews. In 1875 he pronounced before the Philadelphia Bar and the American Philosophical Society, of which he was a member, a discourse upon the "Life and Character of Horace Binney," and in 1879 delivered before the Law Department of the University of Pennsylvania, an address upon the "Growth and Modifications of Private Civil Law." He delivered also a course of lectures to the professors and students of the Union Theological Seminary of New York, upon the "Relations of Civil Law to Church Polity," and for several years, lectures in the Law Department of the Columbian University at Washington. In 1881 he contributed to the North American Review an important article upon "The Needs of the Supreme Court," in which he discussed the various plans suggested for its relief from an undue pressure and accumulation of business, arguing in favor of that which, in its main features, has been recently adopted by Congress. Lafayette College in 1867, and Yale and Princeton in 1870 conferred upon him the degree of LL.D.

Joseph P. Bradley was born at Berne, Albany County, New York, on the 14th of March, 1813. He is the sixth in descent from Francis Bradley, an English emigrant who came to this country in 1645, and settled in Fairfield, Connecticut, in 1660, his descendants removing, in 1791, to Berne. His great-grandfather fought for American Independence, and his grandfather was one of the heroes of the war of 1812, both



Joseph P. Bradley

living to a great age. His father, Philo Bradley, though brought up to farm work, was fond of books and reading, and occasionally taught school. His mother, Mercy Gardner, came of Rhode Island stock, and displayed a genius for mathematical calculations. They were married at seventeen years of age, and Joseph was the eldest of eleven children. His early years were spent most industriously upon the farm, which produced all articles of food and clothing—sugar from the forest, flax from the field, and wool from the flock. Later in life the Judge has been heard to say: "I still preserve the family spinning-wheel and loom as my best title to hereditary respectability." He attended the country school for four months in each year, his favorite study being mathematics, in which, though almost self-taught, he became so proficient as to be able, while yet a mere boy, to practice surveying. At the age of sixteen he became a teacher, and pursued this vocation until his twenty-first year. His general reading was extensive, and his thirst for knowledge slakeless. He enjoyed the advantage of being prepared by the village clergyman, and entered Rutgers College, New Jersey, in September, 1833, from which he graduated with high honors three years later with such distinguished classmates as the late Secretary of State Frelinghuysen, Cortlandt Parker and Governor W. A. Newell. At one time he had formed plans for entering the ministry, but these were abandoned, and he became the principal of a classical school, at the same time pursuing the study of the law in the office of Archer Gifford, Esq., of Newark. During this time he was a frequent contributor to the newspapers of articles upon topics of current interest, and in after life he exerted his talents for speaking and writing, delivering many addresses upon historical, political and scientific subjects before colleges and learned bodies. He also con-

tributed valuable articles to encyclopedias, and carried on an extensive correspondence with men of science.

In 1840 he was admitted to the bar, and for thirty years was engaged in active practice, conducting the most difficult and important cases in both the Federal and State courts, embracing land, commercial, patent and corporation law, as well as questions involving life and liberty. His advice was frequently sought in business transactions. For many years he was actuary of a leading life insurance company, and a director in a savings fund; also a director, as well as the leading counsel of the great railroad corporations of his State.

At the December Term, 1860, he argued his first case in the Supreme Court of the United States, contending with success that unless Congress has passed an act to the contrary, a State may authorize a drawbridge to be constructed over a navigable river, a point frequently affirmed since then without dissent.

At the outbreak of the Rebellion he devoted his eloquent voice and pen to the cause of the Union, neglecting the calls of business and the engagements of the court-room to summon the people of his State to rise, not as partisans, but as Americans "in support of the Constitution and the Government until its authority is vindicated forever." He also exerted himself most strenuously in aiding the railroads, his clients, in forwarding armies and munitions of war to the scene of conflict. Although inclining but little towards political life, originally a Whig and later a Republican, he accepted a nomination for Congress in 1862, but without hope of election, as the district was largely opposed to him in politics. In 1868 he headed the State Electoral ticket for Grant.

In 1870 two vacancies existed in the Supreme Court of the United States, which were filled as we have already stated

by the appointment and confirmation of Mr. Bradley and Mr. Strong. The commission of Mr. Justice Bradley was dated the 21st of March, 1870. He was assigned to the Fifth Circuit, which embraced the Gulf States from Georgia to Texas. For several years more Federal questions arose in this Circuit than in any other, and in settling them, Judge Bradley rendered many important decisions. During this time he added much to his already considerable knowledge of the Civil law, displaying in his opinions, most notably in the Mormon Church case, the richness, variety and solidity of his attainments. Ten years later, upon the resignation of his associate, Mr. Justice Strong, he was assigned to the Third Circuit, to which he has ever since remained attached.

It may be said of his judicial work that in generalizing broadly, and yet analyzing minutely, no small or important fact or reason has escaped his vigilance, nor have details been suffered to obscure the principles of justice. His opinions are marked by great breadth of learning, which enables him to draw from the laws of nations of Continental Europe those fundamental principles of right which are applicable to all systems of government, while he carefully abstains from overstepping the limits of Constitutional power. His views upon maritime law, and cases requiring statutory or Constitutional construction, as well as those relating to Civil rights and *habeas corpus*, are valued as substantial contributions to the science of jurisprudence. His opinions in patent causes are particularly important. His style is powerful and accurate, yet smooth and flowing.

In 1877 he served as a member of the Electoral Commission, sustaining the conclusions of the majority, taking his position after careful study of the facts, and supporting it by elaborate argument. As a scholar, his attainments cover an

unusually wide range of the domain of human knowledge. Of a high order of ability and unflagging application, zealous in his devotion to truth, he has become equally strong and learned in several of the great divisions of scholarship, remaining throughout life a devotee to mathematics and the natural sciences, and amusing himself by calculating eclipses, studying the transit of Venus, and making calendars for determining on sight the day of the week of any date for forty centuries, and the time of new moon in any month of any century past or future, and other abstruse calculations. His linguistic acquirements are also considerable, but he has made all branches of learning tributary to the law, and has been styled by a competent critic "an old-fashioned jurist." The degree of LL.D. was conferred upon him in 1859 by Lafayette College. In 1865 he made an extended visit to Europe, and a short excursion there in 1869. After a lingering illness he died upon the 22d of January, 1892, and his place has been filled by George Shiras, Jr., of Pennsylvania.

Upon the 28th of November, 1872, Mr. Justice Nelson, at the age of eighty years, retired from his position in the Supreme Court to his home at Cooperstown. Ward Hunt, of New York, was commissioned in his place upon the 11th of December, of that year.

Mr. Hunt was born in Utica on the 14th of June, 1810, and was the son of Montgomery Hunt, long the cashier of the old Bank of Utica, and a much respected citizen. After a preparatory course at the Oxford and Geneva Academies, at both of which he had Horatio Seymour as a classmate, he entered Union College and graduated in 1828, with high honors. He attended the law school at Litchfield, Conn., then under the direction of James Gould, a distinguished judge and the author of a *Treatise on the Principles of Pleading*.



Ward Hunt

Returning to his native town he entered the office of Hiram Denio, a lawyer of high rank, and afterwards one of the most distinguished of jurists. Mr. Hunt was admitted to the bar in 1831, but breaking down in health, spent the winter in New Orleans. Upon his return he formed a copartnership with his preceptor, and soon won his way to a lucrative practice and the confidence of numerous clients. In 1839 he served as a member of the New York Legislature, but took little active part in politics, devoting himself chiefly to jurisprudence. In 1844 he was elected Mayor of his native town and shortly afterwards became a candidate for the Supreme Court of the State, but failed because of the hostility of the Irish voters, aroused by his successful defence of a policeman charged with the murder of an Irishman. In early life he was a Jacksonian Democrat, and as such had been elected to the Assembly, but became a Free Soiler and an active partisan of Mr. Van Buren in his canvass for re-election to the Presidency. In 1853 he again failed of election to the Supreme Court. Upon the outbreak of the Civil War he joined the Republican Party and gave it zealous support. In 1865 he became a candidate for the Court of Appeals and was elected by an overwhelming majority. A few years after, he became, under the amended Constitution of the State, a member of the Commission of Appeals, a position which he held at the time of his promotion to the highest Court of the Union.

It has been said of him that while neither a Marshall in intellect, nor a Kent in legal knowledge, he had great judicial ability. Shortly after taking his seat he failed in health and for several years was unable to discharge the duties of his position, but by a special act of Congress was enabled to retire from service upon full salary. His farewell to the bench and

the letter addressed to him by his colleagues are touching and pathetic incidents in the history of the Court, his written reply indicating both in spelling and in grammar, the serious inroads upon his mental faculties by disease.

But few opinions were delivered by him, but the chief of these, *Upton v. Tribilcock*,¹ in which it was held that the original holder of stock in a corporation was liable for unpaid instalments without an express promise, the capital stock of a corporation being a trust fund for the benefit of its creditors, and *Reckendorfer v. Faber*,² in which he elaborately reviewed the cases relating to patents, are indicative of his care and accuracy in the statement of facts and the application of legal principles.

¹91 U. S., 45 (1875).

²92 U. S., 347 (1875).

CHAPTER XIX.

SEVENTH EPOCH CONTINUED: 1874 TO 1888: DEATH OF CHIEF JUSTICE CHASE: APPOINTMENT OF MORRISON R. WAITE AS HIS SUCCESSOR: GENERAL CHARACTER OF CASES CONSIDERED AT THIS TIME: SKETCHES OF CHIEF JUSTICE WAITE AND ASSOCIATE JUSTICES HARLAN, WOODS AND MATTHEWS: LEADING CASES IN CONSTRUCTION OF THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS: THE RIGHT OF SUFFRAGE: THE ENFORCEMENT ACT: RIGHTS OF COLORED MEN TO SERVE AS JURORS: CASES RELATING TO ELECTIONS: DUE PROCESS OF LAW: CIVIL RIGHTS CASES: MORMON POLYGAMY AND BIGAMY A PUNISHABLE CRIME: THE REMOVAL CASES: TENNESSEE *v.* DAVIS: JUILLARD *v.* GREENMAN: THE ZENITH OF FEDERALISM: POWER OF CONGRESS TO RE-ISSUE PAPER AS A LEGAL TENDER IN TIME OF PEACE: KILBOURN *v.* THOMPSON: RIGHT OF THE HOUSE OF REPRESENTATIVES TO PUNISH FOR CONTEMPT: CIVIL SERVICE: THE ELEVENTH AMENDMENT: LOUISIANA *v.* JUMEL: VIRGINIA COUPON CASES: INDIAN TRIBES THE WARDS OF THE NATION: EXCLUSION OF THE CHINESE: THE KANSAS LIQUOR LAW: THE CHICAGO ANARCHISTS: INTERSTATE COMMERCE: THE TELEGRAPH AN INSTRUMENT OF COMMERCE: POLICE REGULATIONS: THE GRANGER CASES: MISCELLANEOUS CASES: LOUISIANA LOTTERY: TELEPHONE CASES: SKETCHES OF ASSOCIATE JUSTICES GRAY, BLATCHFORD AND LAMAR.

THE death of Chief Justice Chase, which occurred upon the 7th of May, 1873, was not an unexpected event.

For many months he had been sinking slowly beneath the deadly pressure of the effects of overwork,—a cause similar to that which had deprived him of the services, as a judicial associate, of his old colleague in the Cabinet, Mr. Stanton. As a Judge, he had displayed much greater moderation of temper, in considering questions involving the character and extent of the powers of the National Government, than had been expected of one who had been foremost among the mightiest combatants for the Nation's existence. The serene and elevated atmosphere of the bench had cooled his blood, and he sat in dignified calmness reviewing his own acts, and fearlessly pronounced them to be in his judgment

mere expedients of war, justified by a strange and terrible emergency, but lacking the essential features of Constitutionality when brought to the final test of the supreme law.

The President offered the vacant chair to Roscoe Conkling, who declined it. The names of George H. Williams, Attorney General, and of Caleb Cushing, an ex-Attorney General of the United States, were then sent to the Senate; but both failed of confirmation. Morrison R. Waite, of Ohio, was then chosen, and was almost immediately and unanimously confirmed, his commission being dated the 21st day of January, 1874.

Some of the most important questions ever determined by the Court were to come before him for adjudication: the Constitutionality of the Enforcement Act; the interpretation of the latest Amendments; the right and power of the States to control and regulate the charges of railroads; the extending necessities of interstate commerce; the death struggle with polygamy; Federal control over elections; the power of the President to remove from office; the Virginia Land Cases; the distribution of the funds arising from the French Spoliation and the Alabama Claims; the power of Congress under the Legal Tender Acts in time of peace; the Virginia Coupon Tax Cases; the power of States to prohibit the liquor traffic; the repudiation of State debts, and the true meaning of the Eleventh Amendment; the questions arising out of the violence of the Chicago Anarchists, and the exclusion of the Chinese. These are the most remarkable of the matters debated before him, and among the most memorable in the jurisprudence of the Nation.

The new Chief Justice was a man almost unknown to the country. His reputation as a sound, sensible and well-informed lawyer, clear and precise in statement, exact in de-

monstration and unblemished in character, had never overstepped the limits of his State until he made his argument before the International Tribunal of Arbitration at Geneva, two years before his promotion to the Bench; but it was not many years before he displayed beneath the concentrated gaze of the nation the mental vigor and moral sturdiness which were the most conspicuous of his ancestral traits. Sprung from a rugged stock, with a touch of iron in the blood, he traced his descent from that Thomas Waite who boldly signed his name to the death warrant of Charles I, and whose son came to Massachusetts with Sir Harry Vane. The stern qualities of the regicide, though softened, were not lost by his descendants. The father of the Chief Justice, Henry Mattson Waite, was a well-known and highly-respected jurist, who had served as a member of the State Legislature and State Senate, as a Judge of the Supreme Court of Errors in Connecticut, and also as Chief Justice of the State.

Morrison Remick Waite was born at Lyme, Connecticut, on the 29th of November, 1816. He graduated from Yale in the year 1837, at the age of twenty-two, numbering among his class-mates William M. Evarts, Benjamin Silliman and Samuel J. Tilden. During the following year he read law in the office of his father, traveled extensively, and then, with the boldness of the pioneer, removed to Ohio, where he completed his legal studies with Samuel M. Younge, in Maumee City. In 1839 he was admitted to the Bar, and formed a partnership with his preceptor, proving himself capable of grasping the minute details of legal controversy and of applying the principles of legal science to facts as they arose. Although devoting himself with singular fidelity to his profession, "the pupil of patient merit rather than the disciple of ambition," nothing of special importance occurred to dis-

tinguish his practice, which grew steadily from year to year. In 1850 he removed to Toledo, and there established a law firm, of which his youngest brother, Richard, became a partner. In the mean time the elder brother became widely known for his successful management of difficult cases, his studious habits and uprightness of character. Although devoid of brilliant talents, he had many opportunities of entering public life, all of which he declined; but he became, in a certain sense, the recognized leader of the Ohio Bar,—a position which he maintained for more than thirty years.

Originally an admirer of Henry Clay and a Whig in politics, when that party disbanded he became a Republican, and was a strong supporter of the policy of Mr. Lincoln's administration. Although urged to accept a nomination for Congress, he declined, and also twice refused a seat upon the Supreme Bench of Ohio. The only office he had held was in 1849, when he served a single term as a member of the Legislature. Simple in his habits, modest, unpretending and studious, a plain but strong man, a solid and substantial Common-law lawyer, bred of Common-law ancestors, he first became known to the Nation when selected by President Grant, in 1871, to represent the United States at Geneva before the Tribunal of Arbitration of the Alabama Claims, under the terms of the Treaty of Washington. Notwithstanding the distinguished reputations of his colleagues, Caleb Cushing and William M. Evarts, his argument in reply to Sir Roundell Palmer, establishing the liability of the English Government for permitting the Confederate cruisers to be supplied with coal in British ports during the Civil War, attracted wide-spread attention for its clear, forcible and succinct presentation of the facts and the robust and direct logic by which he carried conviction upon all points. Upon his



M. R. Waite

return, he quietly resumed his practice, and in 1873 was sent by both political parties as a delegate to the Ohio Constitutional Convention, of which he was immediately chosen President. From this station he was unexpectedly summoned to be the Chief Justice of the Nation.

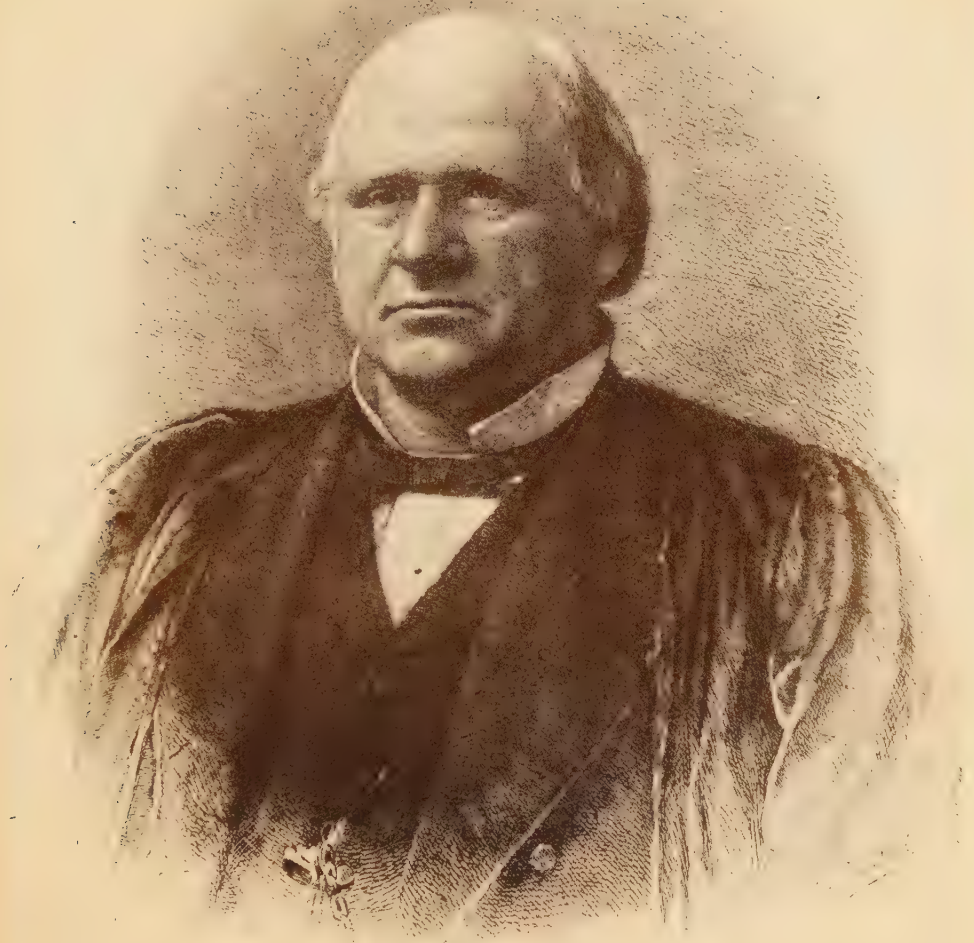
He more than satisfied expectation. His remarkable administrative ability, his steadfast fidelity to legal truth, his sagacity and wisdom, his careful observance of all matters necessary to the successful conduct of his office, his dignity and firmness, his attention to arguments, his habit of viewing all questions in the clear dry light of reason, his promptness in the dispatch of business, and his inflexible integrity, not only won the respect, but commanded the confidence of the country. His personal appearance harmonized with his intellectual and moral endowments. A short, compact, but robust figure, a massive head set squarely upon shoulders of unusual breadth, a mouth unyielding in its outlines, an eye determined in its glance, yet kindly in its light, a voice rich and deep, a step deliberate but firm—these fairly indicated the character of the man.

His judicial style was clear and terse, and some of his most celebrated judgments are remarkable for vigor and brevity. Indulging but little in illustration or ornament, with no trace of passion save when his soul burned with righteous anger over the crime of polygamy, he worked out his results with calmness, and sustained his conclusions with abundant and convincing reasons.

In 1876 he refused to be a candidate for the Presidency, and in the following year declined to serve as a member of the Electoral Commission. At the time of his death he was one of the Peabody Trustees of Southern Education, and had been an earnest advocate of Congressional aid to schools for

the education of Southern negroes. He visited Europe in the summer of 1887, was entertained by Lord Chief Justice Coleridge, and in London was the guest of Lord Bramwell, Lord Fitzgerald, and Baron Huddleston. The London *Law Times* expressed the universal regret that the English Bar had been unable to give so high and honored a personage an official welcome, but as he visited London in the middle of the long vacation, a public ceremony in the Temple was impracticable. His visit, like that of his predecessor Ellsworth, impressed those whom he met with the simplicity of character but rugged strength of an American Chief Justice. So temperately, judiciously and firmly did he discharge his official duties at a trying period in a region still agitated by the throes of war, that after his death the members of the bar of South Carolina, assembled at Circuit, expressed their sense of his impartiality during the days of Reconstruction, and of his friendliness of manner. "Fortunate, indeed," said one, "that there was a man who, amidst the furious passions that rent the country and shook the land, could hold in his steady and equal hand the balance of justice undisturbed." At Circuit his manners were dignified, graceful and winning, but unassuming. Though genial, his bearing commanded respect, and his private character was pure and noble. As a presiding officer he was a model of deportment, and exceedingly urbane. No disorder or levity was ever attempted in his presence. Yale College conferred upon him the degree of LL.D. in 1872, Kenyon College in 1874, and the University of Ohio in 1879. In September, 1887, upon the celebration in Philadelphia of the Centenary of the Framing of the Constitution of the United States, he delivered a remarkable address upon the Supreme Court.

John Marshall Harlan, of Kentucky, who bears the name of the great Chief Justice whose principles he has warmly es-



John M. Harlan

poused, was commissioned as an Associate Justice upon the 29th of November, 1877, in place of Mr. Justice Davis, who had resigned. He was born on the first day of June, 1833, in Boyle County, Kentucky; received an academic education, was graduated from Centre College in that State, in 1850, and prepared for the bar in the Law Department of Transylvania University, where he had the benefit of instruction under two of Kentucky's greatest Chief Justices—Robertson and Marshall. His father, James Harlan, had been a distinguished member of Congress and Attorney-General of his State, accepting in 1862, at the special request of President Lincoln, the office of United States Attorney for the Kentucky District, and holding that position until his death. He was a lawyer of distinction and a leading member of the Bar of his State, living at Frankfort, the State Capital, where he enjoyed a large practice in the Court of Appeals. The son studied and practiced with his father, and was thus brought into familiar intercourse with all the judges and lawyers of note. Admitted to the bar in 1853, five years later he was elected Judge of the Franklin County Court, but held the office but a single year. In 1859 he was nominated as the candidate of the Whig or opposition party for Congress in the "Ashland District," recently represented by John C. Breckinridge and James B. Clay, and was defeated by only sixty-seven votes. In the Presidential contest of 1860 he was an elector on the Bell and Everett ticket, and in the Spring of 1861 moved to Louisville, where he became a law partner of the Hon. W. F. Bullock.

When the Civil War broke out he unhesitatingly took an active part in support of the National Government at a time when the loyalty of his State was doubted by many and the action of every citizen was of moment. He organized and became colonel of the Tenth Kentucky Volunteer Infantry,

one of the regiments constituting the original division of General George H. Thomas, remaining in active service in the field until the death of his father required his presence at home. Although nominated to the office of Brigadier-General, he was obliged for private reasons to tender his resignation and return to civil life. In 1863 he was elected to the office of Attorney-General, removing his residence to the capital of the State, and in 1867 returned to active practice in the city of Louisville. He took a prominent station in the councils of the Republican Party, and in 1871, against his personal inclinations, accepted a unanimous nomination for the office of Governor. Although defeated he received a vote which showed a large increase over the Republican vote of former years. In 1872, at the State Republican Convention, his name was presented to the National Republican Convention in connection with the Vice-Presidency. In 1875 he was again compelled to accept the nomination of his party for Governor, and after a thorough and vigorous canvass increased the Republican vote of the State.

Although it was expected that he would become Attorney-General in the Cabinet of President Hayes, political complications in other States required a different arrangement, and at a later day he was offered a foreign mission, which he declined, preferring not to hold any office disconnected from his profession. He served as a member of the Louisiana Commission in 1877, and in November of the same year, was commissioned as an Associate Justice of the Supreme Court.

At the time he took his seat he was but forty-four years old. But seven other Justices had ascended that bench at an earlier age—Curtis, Campbell and Todd, at the age of forty-two; Iredell, at thirty-nine; Washington, at thirty-six; William Johnson at thirty-three, and Story at thirty-two, while Jay and McLean were of the same age as Harlan.

In the prime of physical and mental manhood and enthusiastically interested in the discharge of his duties, he bent all his energies to the great work before him, and his judicial reputation has grown from year to year. Careful in preparation, lucid and forcible in style, selecting his words with scrupulous care and disposing of the cases before him with promptness and decision, he has taken high rank as a jurist. A careful student of the science of government and the history of the growth of free institutions, he was called upon to fill the chair of Constitutional Law in the Columbian University of the City of Washington, and quite recently his course of lectures has been so enlarged as to embrace Public and Private International Law.

Upon Constitutional questions he adheres closely to the doctrines of Marshall in support of National authority, and some of his most vigorous opinions have been those dissenting from the construction placed by the majority of the Court upon the Thirteenth, Fourteenth and Fifteenth Amendments, all of them marked by a strong individuality of style.

The most noticeable expression of his views is to be found in his dissenting opinion in the Civil Rights cases, in which he maintained that the deprivation of the rights involved was an incident of slavery, and that power was, therefore, given to Congress under the Thirteenth Amendment by appropriate legislation to secure all citizens against such deprivation on account of a previous condition of servitude. He further pointed out that while the second and third clauses of the Fourteenth Amendment were, in form, prohibitions against actions by the States which might operate as a denial of equal rights, immunities and privileges to any of the citizens of the United States, yet the first clause did not refer solely to action by the States, but directly

secured such rights to black citizens, and thus empowered Congress to pass laws acting directly upon and in favor of such citizens. This opinion he pronounced without note or memorandum, subsequently enlarged and reduced to writing. Ardently attached to freedom and free institutions, and anxious that they might be preserved intact, he has exhibited in every opinion involving private rights an intense desire to wipe away technicalities which stand in the way of reaching substantial equity and justice.

Upon the resignation of Mr. Justice Strong, William B. Woods, of Georgia, was commissioned as an Associate Justice on the 21st of December, 1880. He was born at Newark, Licking County, Ohio, on the 3d of August, 1824. His father, Ezekiel Woods, of Scotch-Irish parentage, was a native of Kentucky, and his mother was of New England blood. He was educated at Western Reserve College, at Hudson, where he was a classmate of George F. Hoadley, and was subsequently sent to Yale, from which he graduated, in 1845, with distinction. He then studied law in his native town under Hon. S. D. King, and practiced there, forming a copartnership with his preceptor, to whose careful teaching and conscientious example, he states, he owed his subsequent success in life. In politics he was a prominent Whig, and later became a leader in the Democratic party. In 1856 he was chosen Mayor of his native town, and in the following year was sent to the State Legislature, serving as Speaker of the House with the reputation of being the best of presiding officers, and securing a re-election. Upon the outbreak of the Civil War he entered the army as Lieutenant Colonel of the Seventy-Sixth Ohio Regiment of Volunteers, and until the end of the war, with the exception of three months, was constantly engaged in the field. He participated in the battles of Shi-



W B Woods

loh, Chickasaw, Bayou Ridge, Arkansas Post, where he was slightly wounded, and at Resaca, Dallas, Atlanta, Jonesville, Lovejoy Station and Danville. He was present also at the sieges of Vicksburg and Jackson, and commanded a division in General Sherman's army during its march to the sea. He was appointed Brevet Brigadier-General of Volunteers on the 12th of January, 1865, and Brevet Major-General on the 31st of May of the same year, and was mustered out of service in 1866.

Upon leaving the army he went to Alabama, where he engaged in cotton-planting, and also resumed his law practice, taking an active part in the reconstruction of the State, of which he was appointed Chancellor in 1868. The duties of this office he discharged to the satisfaction of the public, and resigned it because of his appointment by President Grant as United States Circuit Court Judge for the Fifth Circuit, at that time including Georgia, Florida, Alabama, Louisiana, Texas and Mississippi, a post which he held at the time of his promotion to the Supreme Bench by President Hayes. His decisions as a Circuit Judge are reported by himself, in four volumes. His judicial service in the Supreme Court was but little more than six years, but during that time he delivered opinions which sustained the reputation which he had acquired at Circuit, as a painstaking and sensible Judge, of unflagging industry and of saving common sense. His knowledge and experience in relation to the laws of the Southern States were of especial service to the Court in deciding cases arising in that part of the Union.

Some idea of the increase in the business of the Supreme Court can be formed from the statement that during the six years that he was upon the bench, he wrote the opinion of the Court in 218 cases, while Mr. Justice Curtis, who was upon

the bench the same number of years, wrote but fifty-six opinions in all.

The most elaborate of his efforts are those in the Mormon Bigamy case of *Miles v. United States*,¹ the last branch of the celebrated Myra Clark Gaines controversy,² and his demonstration that that portion of the Revised Statutes of the United States which made it a criminal offence for two or more persons in a State or Territory to conspire to deprive any person of the equal protection of the laws of a State was unconstitutional,³ and his maintenance of the Constitutionality of the military code of Illinois prohibiting unauthorized military organizations, drilling or parades, in which he showed that the law in question did not violate the Second Amendment securing to the people the right to keep and bear arms.⁴

Upon the retirement of Mr. Justice Swayne, Stanley Matthews, of Ohio, was duly commissioned an Associate Justice, upon the 12th of May, 1881. Journalist, Lawyer, Judge, Soldier, Politician, Legislator, and Jurist, in each stage of his varied career he displayed a powerful will and a vigorous mind. His father was a professor of mathematics in Transylvania University, at Lexington, Ky., and a ruling Elder in the Presbyterian church. Mr. Matthews was born in Cincinnati, Ohio, upon the 21st of July, 1824, graduated from Kenyon College in 1840, studied law, was called to the bar, and settled in Maury County, Tennessee, but shortly after returned to his native city. He was early engaged in the anti-slavery movements, and was from 1846 to 1849 assistant editor of the Cincinnati *Herald*, the first daily anti-slavery newspaper in that city. A disciple of Chase, he devoted himself

¹ 103 U. S., 304 (1880).

³ *United States v. Harris*, 106 U. S. (1882).

² *Davis v. Gaines*, 104 U. S., 386 (1881). ⁴ *Presser v. Illinois*, 116 U. S., 252 (1885).



Henry Matthews

to the cause with impetuous energy. In 1851 he became a Judge of the Court of Common Pleas of Hanover County, a State Senator in 1855, and from 1858 to 1861 served as United States Attorney for the Southern District of Ohio. In March of 1861 he was commissioned as Lieutenant-Colonel of the Twenty-third Ohio Regiment, serving in West Virginia at the battles of Rich Mountain and Carnifex Ferry. In October of that year, he was appointed Colonel of the Fifty-seventh Ohio, and commanded a brigade in the Army of the Cumberland, being engaged at Dobb's Ferry, Murfreesboro, Chickamauga and Lookout Mountain. Resigning from the Army in 1863, he became a Judge of the Superior Court of Cincinnati. In 1864 he was a Presidential Elector, an office which he also held in 1868. At first a Rationalist and later a Unitarian, he became after serious study, a convert to Calvinism. In 1864 he was a delegate from the Presbytery of Cincinnati to the General Assembly of the Presbyterian Church at Newark, N. J., and as one of the Committee on By-laws, reported the resolutions relating to slavery. In 1876 he was defeated as a Republican candidate for Congress, and the next year was one of the counsel who argued the cases of the Republican electors before the Electoral Commission, making the principal argument in the Florida and Oregon cases—an argument which Senator Edmunds declared stood "almost first among the foremost of the strictly legal and Constitutional considerations that should have influenced, and, I think, did influence the judgment of that tribunal." In March of that year he was elected United States Senator in place of John Sherman, who had resigned to become Secretary of the Treasury, and the following year was promoted to the Supreme Bench.

Although strongly opposed in the Senate, because of the

views he was supposed to entertain towards corporations, the most eminent of his critics, standing by his bier, had the candor to state that his opinions and his assent to those delivered by other judges upon that class of questions had convinced him as well as other Senators that they were mistaken in doubting his judicial capacity and independence. Upright and candid, a helpful and sympathizing friend to the younger members of the bar, fair and just in logic, rich in legal learning, clear in statement, gentle in disposition, affable in conduct, patient and attentive, he won, during the seven years of his judicial service, the respect of his associates, the confidence of the bar, and gave each year fresh assurance of continued growth and predominance. His death elicited the most eloquent and affectionate eulogies from political opponents as well as friends.

His opinions evince research and care, and at times he dissented most vigorously from the doctrines established by the judgment of the majority of the Court—the most noticeable instance being in the well-known case of *Kring v. Missouri*,¹ in which he protested against such an extension of the Constitutional principle forbidding *ex post facto* laws as would result in the escape of a convicted murderer, when, as he contended, the substance of the prisoner's defence upon the merits had not been touched; where no vested legal right under the law had wrought a result upon his legal condition before its repeal.

When Chief Justice Waite ascended the bench in 1874, no graver or more important duties had ever been cast upon the Court. He and his colleagues were confronted by a "broken" condition of social, of legal, of political and of public

¹ 107 U. S., 221 (1882).

affairs. Full of pith and meaning was that one word "Reconstruction," which has become a synonym of the period. Everywhere re-arrangement was necessary, the wastes of war were to be repaired, "the symmetry and strength of judicial predominance over passion" were to be restored and re-established. It was a period of conservative reaction and the conduct of the Court reflected that tendency. The circumspect traits of character of the Chief Justice sustained the impulse imparted by the decision in the Slaughter House Cases on the lines of moderation, and resulted in an interpretation of the Thirteenth, Fourteenth and Fifteenth Amendments which was a surprise to many statesmen, and a disappointment to those who saw, or thought they saw, a more comprehensive chart of liberty sketched in bold outline by men from whose eyes the scales had fallen in the lurid light of civil war. It was information that was new to the framers, said Mr. Shellabarger, when they were told that by those Amendments it was not intended to add anything to the rights of one citizen as against another; that it was not designed to enable Congress to legislate affirmatively or directly for the protection of civil rights, but only to use corrective and restraining measures as against the States so as to secure to the black race the right to be dealt with as equals. It was information that was new, as well as unwelcome, that the provisions creating National citizenship and prohibiting the abridgment of the privileges thereof, and prohibiting the States from depriving any person of life, liberty, property, or the equal protection of the laws, and giving to Congress the power to enforce these provisions by appropriate legislation, added nothing to existing rights, but simply provided additional guarantees for such as already existed. But now, after the lapse of years, when the temper and spirit in which the text of the Amendments was penned have cooled,

and the views of men have matured, it is seen on a survey of all the decisions considered as a body, that the value of the Court as the great conservative department of the government was never greater than then, and that the gratitude and veneration of the Republic in all coming generations will be due to it for having guided the country in safety through many perils, and for having fixed its institutions upon high, just and stable foundations.

The first decision of importance belonging to the class referred to, and one of the earliest delivered by Chief Justice Waite, involved the meaning of the word "citizen" under the provisions of the Fourteenth Amendment, and it was held that although all women are citizens in the sense of being members of a political community or nation, yet as the Constitution had not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted, and as the Amendment did not create new rights, but simply furnished an additional guarantee for the protection of such as were already enjoyed, it followed that the Constitutions and laws of the several States which committed the important trust of suffrage to men alone, were not necessarily void.¹

This was followed by the case of the *United States v. Reese*,² in which an indictment had been found in the District of Kentucky against two inspectors of a municipal election, for refusing to receive and count the vote of a colored man. A demurrer was filed and the question arose whether the Act of Congress, which declared the right of all citizens to vote without distinction of race, color, or previous condition of servitude, had provided an adequate punishment for its violation.

¹ *Minor v. Happersett*, 21 Wallace, 162 (1874).

² 92 U. S., 215 (1875).

It was shown that the Fifteenth Amendment did not confer the right of suffrage upon any one, but was simply intended to prevent the States from giving a preference in this particular to one citizen of the United States over another, and as Congress had not provided in direct terms for the punishment of the specific offence charged, and as the Act under consideration was a penal statute, a strict construction must prevail; the Court could not introduce words of limitation so as to make that specific which was expressed in general terms only. Hence the decision of the lower Court sustaining the demurrer was affirmed.

“It would certainly be dangerous,” said the Chief Justice, “if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at liberty. This would to some extent substitute the judicial for the legislative department of the Government. The Courts enforce the legislative will when ascertained, if within the Constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the Courts; but if it steps outside of its Constitutional limitation, and attempts that which is beyond its reach, the Courts are authorized to, and when called upon in due course of legal proceedings, must annul its encroachments upon the reserved power of the States and people. To limit this statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty.”

Mr. Justice Clifford agreed that the indictment was bad, but for reasons widely different from those assigned by the Court, but Mr. Justice Hunt dissented in a most elaborate opinion.

The Constitutionality of the *Enforcement Acts* was considered in *United States v. Cruikshank*,¹ and it was held that

¹92 U. S., 542 (1875).

while the Fourteenth Amendment prohibited a State from depriving any person of life, liberty or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, yet this provision did not add anything to the fundamental rights of the citizen under the Constitution; that the duty of every republican Government to protect all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and still remained there; and that the only obligation resting upon the United States was to see that the States did not deny such rights. This the Amendment guaranteed, but no more, and the power of the National Government was limited to the enforcement of this guarantee. Hence on an indictment in which it did not appear that the intent of the defendants was to prevent parties from exercising their right to vote on account of their race, it was held that it did not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States, and that counts in such indictment which did not declare that it was the intent of the defendants by conspiracy to hinder or prevent the enjoyment of any right granted or secured by the Constitution, were insufficient to sustain a conviction.

In this judgment Mr. Justice Clifford concurred, but for reasons quite different from those stated by the Court.

In *Strauder v. The State of West Virginia*,¹ more positive results were reached. It was held that the Fourteenth Amendment was intended to secure to a recently emancipated race all the civil rights of the superior race, and to give it the protection of the General Government in the enjoyment of such rights when denied by the States. Citizenship and the

¹ 100 U. S. 303 (1879).

privileges of citizenship were intended to be protected. No legislation of a State discriminating against men on account of color was Constitutional, and therefore a statute of the State of West Virginia denying to colored citizens the right to act as jurors because of their color, though qualified in other respects, was pronounced to be unconstitutional, inasmuch as the State statute secured to every white man the right of trial by jury selected from and without discrimination against his race, and at the same time discriminated against the blacks; the latter race, therefore, did not enjoy the equal protection of the laws. It was not a question, Mr. Justice Strong pointed out, whether a colored prisoner had a right to be tried by a petit jury composed in whole or in part of persons of his own race or color, but whether in the selection of the jury all persons of his race should be excluded by law because of their color, so that by no possibility could a colored man sit upon the jury. From this judgment Justices Field and Clifford dissented.

In the case of *Virginia v. Rives*¹ the Fourteenth Amendment was still further considered, and it was held that it is a State which is prohibited from denying to any person the equal protection of the laws. Two colored men had been indicted in a State Court for murder. The case was removed to the Circuit Court of the United States, and the defendants moved the Court that the venire, which was composed entirely of white men, be so modified as to allow one-third of the panel to be composed of colored men. It was held that inasmuch as Virginia, by her statute, had not forbidden colored men to serve as jurors, there was no act by the State which came in conflict with the provisions of the

¹ 100 U. S. 313 (1879).

Amendment; that that Amendment referred solely to State action, and could not operate upon any action of private individuals. There must be either a legislative denial or disability resulting from it, and in the absence of these features, no one could swear, before his case came to trial, that his civil rights were denied. Mere apprehension was not sufficient. With regard to obstacles to the enjoyment of rights, arising from other causes than from legislative denial, persons of the colored race must take their chances of removing them, or proceed against the offenders in the manner open to the rest of the community. In this judgment Justices Field and Clifford concurred, but for reasons widely different from those stated in the opinion of the Court, the former stating that there could be no assumption by a Federal Court of jurisdiction of offences against the laws of a State.¹

In *Ex parte Virginia*² a county judge had been charged by law with the duty of selecting jurors, and was indicted in the District Court of the United States for excluding certain citizens from his choice, in violation of the Act of March 1, 1875, intended to enforce the provisions of the Fourteenth Amendment, being influenced in his conduct, as was alleged, by a consideration of the race and color of the men excluded. Being in custody, he presented to the Supreme Court a petition for a writ of *habeas corpus* and a writ of

¹In *Missouri v. Lewis*, 101 U. S. 22 (1879) it was held that the Fourteenth Amendment did not prohibit the State from making political subdivisions of its territory, regulating its local government, including the constitution of Courts and their appellate jurisdiction, establishing one system of law in one portion of its territory, and another system in another, so long as it did not abridge the rights and immunities of its citizens. The opinion was delivered by Mr. Justice Bradley, and sustained the right of the States to limit by statute the jurisdiction of their Courts, the right of appeal, and to make it exercisable under different circumstances in different parts of the State.

²100 U. S. 339 (1879).

certiorari to bring up the record. It was held that, while such a writ could not be made to serve the purpose of a writ of error, if a prisoner be held without lawful authority, by an order which an inferior Court of the United States had no jurisdiction to make, the Supreme Court would, in favor of liberty, grant the writ, not to review the case, but to examine the authority of the Court below to act. It was also held that as Congress had enforced the provisions of the Amendment by appropriate legislation, a State could act by its judicial authorities as well as through its Legislature; that the Judge was the agent of the State, and that the Amendment meant that no agency of the State should be exerted in the selection of jurors, which was not a judicial act, and deny to any person the equal protection of the laws by excluding colored men from the jury. Although the discretion of the Judge could not be coerced, yet inasmuch as the statute gave him no discretion to reject colored men in selecting jurors, he was properly indictable. Mr. Justice Field dissented in a most elaborate opinion, which was concurred in by Mr. Justice Clifford. They contended that the indictment was defective; that the State statute vested in the Judge the power of selecting a jury, and, in this selection, he was to exercise his discretion as to "such persons as he thought well qualified to serve as jurors," but that the statute itself made no discrimination against color or race, nor had the Judge done so; for his mere failure to select colored men was no sufficient proof of an intent to discriminate. Nor could Congress exercise a supervisory power over the methods of State officers in the discharge of their official duties. A most exhaustive discussion of the nature of our government and of the relation of the Federal Government to the States was entered upon, and it was insisted that Congress could

not interfere with the administrative functions of the States. No doctrine could be more destructive of State autonomy or more humiliating or degrading.

In *Ex parte Siebold*¹ the question was discussed whether in the regulations of elections for members of Congress the National and State Governments could or could not co-operate, or whether their action must be exclusive of each other, so that if Congress assumed to regulate the subject at all, it must assume exclusive control. It was held by Mr. Justice Bradley that there was nothing in the Constitution to prevent such co-operation, and a concurrent jurisdiction was contemplated; that of the State, of course, being subordinate to that of the United States, but only to the extent to which Congress had seen fit to interfere.

"It seems to be often overlooked," said he, "that a National Constitution has been adopted in this country, establishing a real Government therein, operating upon persons and territory and things; and which, moreover, is or should be as dear to every American citizen as his State Government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State Governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority."

Justices Field and Clifford again dissented, contending that it was incompetent for the Federal Government to enforce, by coercive measures, the performance of a plain duty, imposed by Congress upon the executive officer of a State, and that it would seem to be equally incompetent for it to enforce, by similar measures, the performance of a duty imposed upon him by a law of a State; that Congress could not

¹ 100 U. S. 391 (1879).

punish for the non-performance of a duty which it could not prescribe, and that it was a contradiction in terms to say that it could inflict punishment for disobedience to an act the performance of which it had no Constitutional power to command.¹

In *Neal v. Delaware*² it was held, in an opinion by Mr. Justice Harlan, that the Constitution of Delaware, which had been adopted in 1831, and gave the right of suffrage, with a few special exceptions, to "free white male" citizens, was in conflict with the Fifteenth Amendment, the effect of which was to annul so much of the State Constitution as was inconsistent therewith, and that thenceforward the jury statute was enlarged in its operation so as to render colored citizens, otherwise qualified, competent to serve as jurors in the State Courts. From this judgment Chief Justice Waite dissented, on the ground that the mere fact that persons of color had not been allowed to serve on juries where colored men were interested, was not enough to show that the defendants had been discriminated against because of their race, and that he could not believe that the refusal of the Court below, upon an affidavit unsupported by evidence, to quash the indictment and quash the panel of jurors, because the defendant had been discriminated against on account of his race, was such an error in law as to justify a reversal of the judgment. Mr. Justice Field dissented substantially on the same grounds.

"To afford equality of protection," said he, "to all persons by its laws, does not require the State to permit all persons to participate equally in the administration of those laws, or to hold its offices, or to discharge the trusts of government. Equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning

¹ See also *Ex parte Clarke*, 100 U. S. 399 (1879).

² 103 U. S. 370 (1880).

of the Amendment, when its Courts are open to them, on the same terms as to others, with like rules of evidence and modes of procedure for the security of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuits of happiness which do not equally affect others; when they are liable to no other nor greater burdens nor charges than such as are laid upon others, and when no different nor greater punishment is enforced against them for a violation of the laws."

In a later case¹ Federal control over elections for members of Congress was distinctly sustained, and such control was not diminished or annulled because an election for State officers was held at the same time or place. While affirming the doctrine that the Fifteenth Amendment gave no affirmative right to the black man to vote, but simply prevented discrimination against him whenever the right was granted to others, yet it was asserted that under some circumstances it might operate as the immediate source of a right to vote. Thus in all cases where the States had not removed from their Constitutions the words "white man" as a qualification for voting, the provision did have the effect of conferring on him the right to vote because it annulled the word *white*, and thus left him in the enjoyment of the same rights as white persons. The particular offence charged was that of conspiring to intimidate a black voter, and prevent him by beating and wounding from voting for a member of Congress.

"If the Government of the United States," said Mr. Justice Miller, "has within its Constitutional domain no authority

¹ *Ex parte Yarbrough*, 110 U. S., 651 (1883). The same principle was sustained as to a conspiracy to prevent a person from exercising the right to make effectual his homestead entry, *United States v. Waddell*, 112 U. S., 76 (1884); and as to a conspiracy to drive the Chinese from their homes, *Baldwin v. Franks*, 120 U. S., 678 (1886).

to provide against these evils, if the very source of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger and its best powers, its highest purposes, the hopes which it inspires and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

Another class of rights within the protection of the Fourteenth Amendment was considered in *Kennard v. State of Louisiana*,¹ the Chief Justice showing that an Act of a State, by which provision had been made for the trial of a case before a Court of competent jurisdiction, by bringing the accused before the Court, and notifying him of the charge he was required to meet, thus giving him an opportunity to be heard, and also providing for due deliberation and judgment on the part of the Court, and for an appeal to the highest Court of the State, was not in violation of the provisions of the Constitution which prohibited any State from depriving any person of life, liberty or property without due process of law.

And in *Walker v. Sauvinet*² the question whether a citizen had been deprived of the right of trial by jury was discussed, and it was held that the requirement of the Constitution that a person could not be deprived of his property without due process of law, did not imply that all trials in the State Courts affecting property must be by jury; that the Constitutional requirement was fully met if the trial was had according to the settled course of judicial proceedings; that due

¹92 U. S., p. 480 (1875). Affirmed in *Foster v. Kansas*, 112 U. S., 201 (1884).

²92 U. S., 90 (1875), affirming *Edward v. Elliott*, 21 Wallace, 557 (1874). See also *Pearson v. Yeudall*, 95 U. S., 294 (1877), in which it was held that States might regulate Jury trials.

process of law was process according to the law of the land, which was subject to regulation by the law of the State, and inasmuch as the State Court had decided that the proceedings below were in accordance with the law of the State, it was not found to be contrary to the Constitution or any law or treaty of the United States, nor did the Fourteenth Amendment forbid the abridgment of the right of trial by jury in suits at common law in the State Courts.

In illustration of the doctrines thus established, the *Civil Rights Cases*¹ were decided. Congress, by an Act passed March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," had endeavored to secure to all persons within the jurisdiction of the United States the full and equal enjoyment of the accommodations, advantages and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to such conditions and limitations as were established by law, and were applicable alike to citizens of every race and color, regardless of any previous condition of servitude. Suitable penalties were provided for any violation. In delivering the opinion of the Court, Mr. Justice Bradley declared that it was the simple purpose of the law to provide that no distinction should be made between citizens of different race or color, or between those who had, and those who had not, been slaves, and that its effect was to secure to such persons the same accommodations and privileges as were enjoyed by white citizens. But it was State action of a particular character that was prohibited. No individual invasion of rights was the subject matter of the Fourteenth Amendment, which did not invest Congress with power to legislate upon subjects which were within the domain of State legislation, but simply

¹109 U. S., 3 (1883).

provided modes of relief against State action. It did not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of State laws and the actions of State officers, executive or judicial, whenever these were subversive of fundamental rights. But until some State law had been passed, or some State action, through its officers or agents, had been taken, adverse to the rights of citizens sought to be protected by the Amendment, no legislation of the United States, nor any proceeding under such legislation, could be called into activity. The civil rights guaranteed by the Constitution against State aggression could not be impaired by the wrongful acts of individuals unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. If one individual did a wrong to another the remedy should be sought in the State tribunals, and until such right had been denied by State action, no ground for the interposition of Congress arose. The legislation authorized by the Amendment to be adopted by Congress for enforcing its provisions, was not direct legislation upon the matters respecting which the States were proscribed from making or enforcing laws or doing certain acts, but was *corrective* legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. While the Thirteenth Amendment abolished slavery and involuntary servitude, and by its reflex action established universal freedom in the United States, and Congress might probably pass laws directly enforcing its provisions, yet such legislative power extended only to the subject of slavery and its incidents, and the denial of equal accommodations in inns, public conveyances and places of public amusement, imposed no badge of servitude incapable of redress in the ordinary

tribunals. The point that Congress under the commerce clause might pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States, was not decided.

From this judgment and reasoning Mr. Justice Harlan dissented, because the opinion was based upon grounds entirely too narrow and artificial. He contended that the true meaning and purpose of the Amendment was to secure direct legislation by Congress in favor of the citizens, operating directly upon them, not limited to State action either by legislative act or judicial or executive interference. The Amendment was aimed at class tyranny, and was not limited to the colored race, which was denied by corporations and individuals wielding public authority rights fundamental to their freedom and citizenship. He predicted that at some future time it might be some other race which would fall under the ban of race discrimination, and that if the Constitutional Amendments were enforced according to the intent with which, as he conceived, they were adopted, there could not be in this Republic any class of human beings in practical subjection to another class, with power in the latter to dole out just such privileges as they might choose to grant.

From the consideration of the true scope and meaning of the *Post Bellum* Amendments and Civil Rights, we turn to a high moral question. In the case of *Reynolds v. United States*,¹ Chief Justice Waite delivered a notable opinion, deciding that bigamy in Utah was a crime against the United States, and punishable under the statutes for the government of the Territories. The question arose whether, under the First Amendment to the Constitution providing for civil and religious liberty, a man's religious

¹98 U. S., 145 (1878).

belief could be accepted as a justification for committing an act made criminal by the law of the land. Reynolds had been married in Utah knowing that he had a wife living elsewhere, and set up by way of defence that the church of which he was a member enjoined polygamy. The Chief Justice, in a most interesting examination of the history of religious freedom and the statutory and Constitutional provisions intended to secure it, showed that marriage, while a sacred obligation, was a civil contract regulated by law, lying at the very foundations of society, the source of social relations, obligations and duties. Although Congress could not pass a law prohibiting the free exercise of religion, yet it was clearly within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy should be the law of social life under its dominion. Hence the statute under consideration was within the legitimate power of Congress and a Constitutionally valid act, as prescribing a rule of action for all those residing in the Territories. It could not be that those who were by religion polygamists could commit an act which the law declared to be a crime, and go unpunished, while those who were not polygamists were amenable to the criminal courts:

“Suppose,” said he, “one believed that human sacrifices were a necessary part of religious worship; could it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife justly believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?”¹

¹ See also *Miles v. U. S.*, 103 U. S., 304 (1880); *Murphy v. Ramsey*, 114 U. S., 15 (1884), in which the Edmunds law prohibiting cohabitation with more than one woman was sustained; *Cannon v. United States*, 116 U. S., 55 (1885), in which bigamy was defined; and *Snow v. United States*, 118 U. S., 349 (1885).

A new and copious source of Federal power was now explored. The case of *Tennessee v. Davis*¹ embraced the relation of the General Government to the States. A deputy Collector of Internal Revenue had been indicted in a State court for murder. He filed a petition to remove the case into the Circuit Court of the United States, alleging that his act was committed in self-defence while discharging his official duties in seizing an illicit distillery. The case was brought to the Supreme Court upon a certificate of division of opinion between the judges in the Court below. It was argued, in an opinion by Mr. Justice Strong, that the United States Government, acting directly upon the States and the people of the States, though limited in its power, was supreme; so far as those powers extended no State could exercise them, or obstruct their exercise. The General Government would cease to exist if it could not enforce its powers within the States through the instrumentality of its own officers, and if, when thus acting within the scope of their authority, they could be arrested and brought to trial in a State Court for an alleged offence against the laws of the State in the performance of an act which was warranted by the Federal authority which they possessed—if the General Government could not interfere for their protection—if such protection depended on the States—it would be possible for any State at pleasure to arrest the operations of the General Government. It was asserted that the judicial powers of the United States, embracing all cases in law and equity, extended to civil and criminal cases alike, and it was shown by vigorous reasoning that the act for which Davis had been indicted had been done under and by virtue of his office, and while he was resisted by an armed force in his attempts to discharge his official duty:

¹ 100 U. S., 257 (1879).

"We come then to the inquiry," said he, "most discussed during the argument . . . Has the Constitution conferred upon Congress the power to authorize the removal, from a State Court to a Federal Court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government's preserving its own existence."

It was shown that it was no invasion of the sovereignty of a State to withdraw from its courts into the courts of the General Government the trial of prosecutions for offences against the criminal laws of the State, whenever the defence presented a case arising out of an Act of Congress. The dual nature of our government could not be ignored. The States were not completely and in all respects sovereign. Congress had necessarily the right to provide for the removal of criminal causes as well as civil cases. In fact it was more necessary that this jurisdiction should be extended over criminal than over civil cases:

"If it were not admitted," said he, "that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

Justices Clifford and Field dissented. In their judgment the case involved issues no less grave than the nature, extent and limitation of the judicial power of the United States, and they contended that the Federal Courts had no criminal jurisdiction, except such as was expressly conferred by an Act of Congress in pursuance of a Constitutional grant. As long as it had not been declared in express terms that resistance offered

to a revenue officer in the performance of his duty was a crime against the United States, the whole matter must be left to the State tribunals. They pointed out that no Act of Congress gave a revenue officer immunity to commit murder in a State, or prohibited the State from executing its laws for the punishment of the offender. Criminal homicide in a State was clearly an offence against the State, unless committed within the exclusive jurisdiction of the United States. They characterized it as an amazing proposition that an indictment for a wilful and felonious murder, pending in a State Court found by a grand jury of a State, under a statute of a State, and not involving any Federal question, could be removed from the State Court into the Circuit Court of the United States for trial, merely because the prisoner at the time he committed the homicide was a deputy collector of internal revenue.¹

The final and most extraordinary extension of Federal power was now reached.

In *Juillard v. Greenman*² it was determined that Congress had the Constitutional power to make the Treasury notes of the United States a legal tender in payment of private debts in time of peace as well as in war, and that the Act of Congress of May 31st, 1878, which provided for the re-issue of notes, issued during the war of the Rebellion but which had been redeemed and paid in gold coin at the Treasury, was a Constitutional exercise of power, and that the Secretary of the Treasury could re-issue and keep in circula-

¹The principle established by the decision has been firmly upheld and illustrated in the later cases of *Strauder v. Virginia*, 100 U. S., 303 (1879); *Virginia v. Rives*, *Ibid.*, 313 (1879); *Ex parte Virginia*, *Ibid.*, 339 (1879); *Railroad Company v. Mississippi*, 102 U. S., 140 (1880); *Davis v. South Carolina*, 107 U. S., 599 (1882); and the recent much discussed case, *In re Neagle*, 135 U. S., 1 (1890), in which the dissenting Justice, Field, was directly concerned. ² 110 U. S., 421 (1884).

tion such notes, and that when re-issued, they were legal tenders. It was strongly contended by Senator Edmunds and Mr. William Allen Butler as counsel that the previous decisions of the Court¹ had simply established the legal tender quality of Treasury notes as a temporary expedient, necessary as a means of averting National destruction, but otherwise unjustifiable, and that the debates in Congress, the declarations of the Executive department, as well as the language of the Judicial department went no farther, that in the absence of public exigency legal tender legislation was not a means appropriate to any legitimate end of government; that inasmuch as an exigency created a power, so it limited the duration of the power, and that any attempt to exercise it after the war which had called it into being had closed, and had been succeeded by the calm and order of established peace, was in excess of any power reposed by the Constitution in Congress. The opinion was delivered by Mr. Justice Gray, who re-examined the entire question, and after a full consideration of the Acts, declared that the Court was of opinion that no distinction in principle could be drawn between the cases theretofore determined, and the one at bar. Having satisfied itself of the existence of the power, the Court declared that the question of the propriety of its exercise at any particular time, whether in war or peace, was a question entirely for the determination of Congress, and was not a judicial question. The Court, therefore, declined to pass the line which circumscribed the Judicial department to tread on legislative ground. From this judgment Mr. Justice Field alone dissented in an opinion replete with learning and marked by vigorous and emphatic reasoning. He contended that the decision of the Court would

¹Legal Tender Cases, 12 Wallace, 528 (1870).

breed many evils, and that hereafter no restraint could be imposed upon unlimited appropriations by the Government for all imaginary schemes of public improvement if the printing press could furnish the money that was needed for them.¹

In the great case of *Kilbourn v. Thompson*,² Mr. Justice Miller had occasion to examine the right of the House of Representatives to punish citizens for contempt of its authority. Kilbourn had been summoned as a witness by a committee of Congress, and had refused to answer questions concerning the business of a real estate pool of which he was a member, and had refused to produce books and papers, which it was claimed had a bearing on the rights of the United States as a creditor of Jay Cooke & Co., then in bankruptcy, the firm having a large interest in the pool. By an order of the House he was imprisoned for forty-five days in the jail of the District of Columbia for his contempt. On his release he sued the Sergeant-at-Arms, who had executed the order, and the members of the committee who had been instrumental in securing it. It was held that each House could punish its own members for disorderly conduct or for failure to attend its sessions, and could decide cases of contested elections and determine the qualifications of its members, and exercise the sole powers of impeachment, and in the performance of such duties could summon witnesses, or punish them

¹ This decision awakened the most extraordinary excitement and led to criticism, discussion and argument in all quarters. Among the most noticeable of the papers produced by this great judicial debate was an adverse paper by George Bancroft, the eminent historian, entitled "A Plea for the Constitution of the United States Wounded in the House of its Guardians." See also a reply to Mr. Bancroft's argument by Mr. R. C. McMurtrie, of Philadelphia, an article in the "American Law Review," Vol. IV, p. 768, by Mr. Justice O. W. Holmes, Jr., of Massachusetts, and an article in the "Harvard Law Review" for May, 1887, Vol. I, p. 73, by Professor James B. Thayer, of the Harvard Law School. See also Bryce's "American Commonwealth," Vol. I, p. 264.

² 103 U. S. 168 (1880).

for contumacy. But this power did not extend generally to the punishment of a witness for contumacy, unless his testimony was required in a matter into which the House had jurisdiction to inquire. But neither House possessed the general power of inquiring into the private affairs of a citizen. It could not be known until it had been fairly ascertained that the Courts were powerless to redress the creditors of Jay Cooke & Co.; and as the matter was still pending in court, Congress had no right to interfere, the subject matter of the investigation being judicial and not legislative. The doctrine which had been announced in *Anderson v. Dunn*¹—that the finding of the House that the plaintiff had been guilty of contempt was conclusive—was limited, and partially overruled. It was denied that Congress possessed a general power of punishing for contempt. Wherever they proceeded in a matter beyond their legitimate cognizance, their right to fine and imprison a man was not beyond the power of the Courts to inquire into the grounds on which the order was made. The House of Representatives was not the final judge of its own powers and privileges in cases in which the rights and liberties of the citizen were concerned. No such arbitrary or uncontrollable prerogative existed. The resolution of the House finding Kilbourn guilty of contempt, and the warrant of its Speaker for commitment to prison, were not conclusive, and could not be pleaded by the Sergeant-at-Arms as a justification in an action brought against him for false imprisonment. But as the members of the committee had taken no part in the actual arrest, and were protected by the Constitutional provisions in relation to freedom of debate, no liability attached to them.

¹ 6 Wheaton, 204 (1821).

In the case of *Ex parte Curtis*¹ an Act of Congress was sustained which prohibited officers or employes from requesting, giving to, or receiving from any other officer or employé of the Government any money or property or other thing of value for political purposes, and a blow was thus struck, in behalf of Civil Service Reform, against involuntary political assessments. The Chief Justice based the decision upon the ground that the act simply prohibited officers or employes of the government from giving to or receiving from each other. Beyond this it restricted no political privileges. Its purpose was to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service; such a purpose was clearly within the just scope of legislative power. Mr. Justice Bradley dissented. The effect of such a law, he contended, was to prevent the citizen from co-operating with other citizens of his own choice in the promotion of his political views, and the denial to a man of the privilege of associating and making joint contributions with such other citizens as he might choose, was an unjust restraint of his right to propagate and promote his views on public affairs.

In 1882 the conflagration which had been kindled in *Chisholm's Exrs. v. Georgia*, and smothered by the Eleventh Amendment, again broke forth. Could a State be sued? Could repudiation be successfully accomplished? Was there no redress for the injured creditor of a sovereign State? A number of cases came before the Court under the general title of *Louisiana v. Jumel*.² The Legislature had, by an Act, in 1874, provided for an issue of bonds consolidating and reducing the floating and bonded debt of the State. A

¹ 106 U. S. 371 (1882).² 107 U. S. 711 (1882).

tax was imposed which was to be annually levied and collected for the purpose of paying the interest and principal of the bonds thereby authorized, and the revenues thus derived were to be set apart and appropriated to that purpose, and no other; and it was declared that it should be deemed a felony for any officer of the State to divert the fund. Immediately after the passage of this Act an Amendment to the Constitution was adopted, by which the issue of bonds was declared to create a valid contract between the State and the holders of the bonds, which the State could by no means impair. Six years later a new Constitution went into effect, by which the rate of interest on the consolidated bonds, previously authorized, was reduced, and the bondholders were given an option to demand in exchange for the bonds held by them bonds of new denominations, to be issued at the rate of seventy-five cents upon the dollar. The holders of the former bonds demanded payment of their coupons. Such payment was refused by the Auditor and Treasurer of the State. The question, as stated by the Chief Justice, was whether the contract between the bondholders and the State could be enforced, notwithstanding the new Constitution, by coercing the agents and instruments of the State, whose authority to levy and collect the tax had been withdrawn in violation of the terms of the contract, without having the State, in its political capacity, a party to the proceedings. The answer was in the negative. In reply to the argument that the State Treasurer was a trustee of the moneys in his possession for the benefit of the complainants it was shown that he was a mere keeper of the State funds, holding them as the agent of the State. If there was any trust, the State was the trustee, and unless the State could be sued, the trustee could not be enjoined. Nor could a committee of bondhold-

ers, by writ of mandamus, compel the executive officers of the State to perform their duties under the State law. The Courts of the Union could not claim jurisdiction over State officers in charge of public moneys, so as to control them as against the political power, in their administration of the finances of the State. The State had not submitted herself without reservation to the jurisdiction of a Court; and it was too clear for controversy that a suit against a State officer, in such a case as that at bar, was practically a suit against the State itself.

"The remedy sought," said Chief Justice Waite, "in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State as a State was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place."¹

Mr. Justice Field dissented, admitting that the sovereign cannot be held amenable to process in his own Courts without his consent, but contending that the conduct of the State was virtually a repudiation of her former engagements and a direct violation of the inhibition of the Federal Constitution against the impairment of the obligation of contracts. Wherever a State entered the markets of the world as a borrower,

¹ The same doctrine was substantially asserted in *Elliott v. Wiltz*, 107 U. S., 711 (1882), and *Cunningham v. Macon and Brunswick R. R. Co.*, 109 U. S., 446 (1883). An instance of where a State had provided a remedy against herself by mandamus is to be found in *Antoni v. Greenhow*, 107 U. S. 769 (1882), and it was held she could not modify the remedy so as to impair the obligation of the contract.

she laid aside her sovereignty for the time, and became responsible as a civil corporation; and although suits against her, even then, might not be allowed, yet her officers could be compelled to do what she had directed that they should do. He contended that where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the Court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.¹

Mr. Justice Harlan also dissented. In his view the Constitution of Louisiana in effect nullified the previous undertakings of the State; the obligation of solemn contracts had been impaired; the judicial arm of the Nation was hopelessly paralyzed in the presence of an ordinance destructive of the rights of the bondholders, and passed in admitted violation of the Constitution of the United States. He contended that the suits were not brought against the State merely because they were brought against its officers; that the officers of Louisiana could not rightfully execute the provisions of the State Constitution which conflicted with the supreme law of the land; the Courts of the Union should not permit them to do so; but for the adoption of the Ordinance of 1879, the State officers could have been restrained by injunction from diverting funds collected to meet the interest on the consoli-

¹He relied upon *United States v. Lee*, 106 U. S., 196 (1882), the famous suit brought for the recovery of the Arlington estate, now a National cemetery, and *Davis v. Gray*, 16 Wallace, 203 (1872).

dated bonds, and could have been compelled by mandamus to perform purely ministerial duties, enjoined by the statute and Constitution of 1874.

A similar result was reached in the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*,¹ which arose out of an effort on the part of the bondholders to obtain their rights through an assignment of their claims to the plaintiff States. It was held that inasmuch as they were precluded from prosecuting suits in their own names, they could not sue in the name of their respective States, even with the consent of the plaintiff States. A State could not allow the use of its name in such a suit for the benefit of one of its own citizens. A State was not an independent nation, clothed with the right and the faculty of making an imperative demand upon another independent State for the payment of debts which were owing to its citizens, nor could one State create a "controversy" with another State, within the meaning of that term as used in the Constitution, by assuming the prosecution of debts owed by the defendant State.

Although the practical result of these rulings was to enable the States to repudiate their debts, yet it was held that the meaning of the Eleventh Amendment was too clear to admit of evasion. Its evident purpose, promptly proposed as it had been upon the announcement of the decision in *Chisholm's Executors v. Georgia*, and almost immediately adopted, was to prohibit all suits against a State by or for citizens of other States or aliens, without the consent of the State to be sued. Such being the case, the Court was satisfied that it was prohibited both by the letter and the spirit of the Con-

¹ 108 U. S., 76 (1882).

stitution, from entertaining the suits, which were consequently dismissed.¹

Several interesting cases relating to the Indian tribes arose at this period. In the first of these² it was held that an Indian was not a citizen of the United States within the meaning of the Fourteenth Amendment, even though he alleged that he was born within the United States and had severed his tribal relations, and fully and completely surrendered himself to the jurisdiction of the United States, and was a *bona fide* resident of the State of Nebraska. The opinion was delivered by Mr. Justice Gray, and was based upon the ground that an Indian could not make himself a citizen of the United States without the consent and co-operation of the Government; that the mere fact that he had abandoned his nomadic mode of life or tribal relations, and adopted the manners and habits of civilized people might be a good reason why he should be made a citizen, but did not of itself make him one; that citizenship of the United States was a political privilege which no one not born to could assume without the consent of the Government in some form. From this judgment Justices Harlan and Woods dissented because under the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, were citizens of the United States and of the State wherein they resided.

In a later case it was shown that by various treaties the United States had recognized the Cherokee Indians as one people, composing a single tribe or nation, and that when the Cherokees in North Carolina dissolved their connection with

¹The converse of these cases is found in *Hagood v. Southern*, 117 U. S. 52 (1885), and the scope and purpose of the Eleventh Amendment is fully considered by Mr. Justice Matthews in *In re Ayers*, 123 U. S. 443 (1887).

²*Elk v. Wilkins*, 112 U. S., 94 (1884).

their nation, and refused to accompany the body of it on its removal, they had no separate political organization, and hence were not entitled to a share of an annuity fund created by sales of Cherokee lands west of the Mississippi; that they must be re-admitted to citizenship in the Cherokee Nation in compliance with its Constitution and laws if they wished to enjoy the benefits of its property.¹

In a still later case² it was held that while the United States Government had recognized in the Indian tribes a state of semi-independence and pupilage, it had the right and authority, instead of controlling them by treaties, to govern them by Acts of Congress, and that they were necessarily subject to the laws which Congress might enact for their protection and for the protection of the people with whom they came in contact; that the States had no such power over them as long as they maintained their tribal relations; that they owed no allegiance to a State within which their reservation might be established, and that the State could give them no protection: hence it followed that an Act of Congress giving jurisdiction to the courts of the Territories of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny committed by Indians within the Territories, was Constitutionally valid, and gave jurisdiction in like cases to the courts of the United States over the same crimes committed on an Indian Reservation within a State of the Union.³

In 1885 the Court discharged certain Chinese prisoners who had been proceeded against under an ordinance of the city of San Francisco, providing that it should be unlawful

¹Cherokee Trust Funds, 117 U. S., 288 (1885).

²U. S. *v.* Kagama, 118 U. S., 375 (1885).

³The same result was practically reached in *Choctaw Nation v. United States*, and U. S. *v.* Choctaw Nation, 119 U. S., 1 (1886).

for any person to engage in the laundry business without having first obtained the consent of the Board of Supervisors, unless the same be located in a building constructed either of brick or stone, because it did not prescribe a rule and conditions for the regulation of the use of laundry property to which all similarly situated might conform, and because it conferred a naked arbitrary power upon the Board of Supervisors to give or withhold consent, and made all those engaged in the business the tenants at will under the Board as to their means of living. It was declared that the rights of the petitioners were none the less because they were aliens and subjects of the Emperor of China.¹ In a later case although an Act of Congress provided for the punishment of conspirators to deprive the Chinese, residing within a State, of rights secured to them by treaty, it was decided that forcibly expelling them from their homes in the town in which they resided, was not an offence punishable under the statute, which was held to apply only to conspiracies affecting citizens in their enjoyment of the elective franchise and their civil rights as citizens.² In the *Chinese Exclusion Case*,³ the Act of Congress prohibiting those Chinese laborers from re-entering the United States, who had departed before its passage with a certificate issued under a former Act granting them permission to return, was held to be valid, on the ground that even though the Act was in contravention of express treaty stipulations, it was not on that account invalid or to be restricted in its enforcement. Treaties were of no greater legal obligation than other Acts of Congress, and were subject to modification or repeal. The question whether the Government was justified in disregarding

¹ *Yick Wo v. Hopkins*, 118 U. S., 356 (1885).

² *Baldwin v. Franks*, 120 U. S., 678 (1886).

³ *Chae Chan Ping*, 130 U. S., 581 (1889).

its engagements with another nation was held not to be one for the determination of the Court. The United States, through the action of its Legislative department, could exclude aliens from its territory, although no actual hostilities existed with the nation of which such aliens were the subjects, the power of excluding foreigners being an incident of sovereignty, hence the right to its exercise could not be granted away or restrained.

In the case of *Foster v. Kansas*,¹ it was held in confirmation of a former decision² that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the Constitution of the United States,³ and this was followed by the determination that legislation by a State, prohibiting the manufacture within her limits of intoxicating liquors to be there sold and bartered for general use as a beverage, did not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States. Under the exercise of the police powers of the State it was competent for the Legislative department to determine primarily what measures were appropriate or needful for the protection of the public morals, the public health or the public safety, and the Fourteenth Amendment did not deprive the States of these powers, or impose restraint upon their exercise.⁴

¹ 112 U. S. 201 (1884).

² *Bartemeyer v. Iowa*, 18 Wallace, 129 (1873).

³ See also *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877).

⁴ *Mugler v. Kansas*, 123 U. S., 623 (1887). See also *Bowman v. Chicago and Northwestern R. R. Co.*, 125 U. S. 465 (1887), in which it was held that a law of Iowa forbidding the bringing into the State from other States of any intoxicating liquors without a certificate, as therein required, was a regulation of commerce among the States, and was void as repugnant to the Constitution, such statute not being an inspection law, nor a quarantine or sanitary law, and therefore not a legitimate exercise of the police power of the State.

In the case of *Ex parte Spies*,¹ known as the case of the Chicago Anarchists, it was held that the first ten Amendments to the Constitution were not intended to limit the powers of the State Governments in respect to their own people, but simply operated on the National Government, and that where challenges to jurors for bias were disallowed, and the juror was peremptorily challenged and excused, and an impartial juror obtained in his place, the Constitutional right of the accused was maintained. The finding of the trial Court upon the issue of whether the jury was impartial, ought not to be set aside unless the error was manifest, and where the challenge was on the ground that the juror had formed an opinion, it must be made to appear clearly that upon the evidence the Court ought to have found that he had formed such an opinion that he could not in law be deemed impartial. It was also held that the objection that the defendants were foreign born, and had been denied by the trial Court rights guaranteed by treaty, could not be raised in the Supreme Court for the first time, the point not having been considered by the Court below; so, too, the objection that the defendants were not actually present in the State Court when sentence was pronounced, could not be made, if the record showed that they were present.²

The *Granger Cases* now claim attention. In *Munn v. The State of Illinois*³ it was held, in an opinion by Chief Justice Waite, that under the limitations upon the legislative power of the States imposed by the Constitution of the United States, the

¹ 123 U. S. 131 (1887).

² See also *Brooks v. Missouri*, 124 U. S. 394 (1887) in which it was held that it must appear on the record that some right, title, privilege or immunity was specially set up or claimed in the State Court at the proper time, and in the proper way, and that the decision was against the right so set up or claimed.

³ 94 U. S., 113 (1876).

Legislature of Illinois could fix by law the maximum of charges for the storage of grain in warehouses at Chicago, and other places in the State, it being a mere common law regulation of trade or of business. The act was not unconstitutional, and when private property was devoted to a public use it was subject to public regulation. From this judgment Justices Field and Strong dissented.

In the case of the *Chicago, Burlington and Quincy Railroad Company v. Iowa*¹ it was held that the railroad companies engaged in a public employment affecting the public interest, were subject to legislative control as to their rates of fare and freight unless protected by their charters, and that the Illinois statute to establish a reasonable maximum rate of charges for the transportation of passengers and freight on the different railroads of the State, was not void as being repugnant to the Constitution of the United States, or to that of the State. This opinion was also delivered by the Chief Justice, and dissented from by Justices Field and Strong. In further illustration of the doctrine, it was held in the *Railroad Commission Cases*² that the right of the State to impose reasonable limits upon the amount of charges by railroads for the transportation of property could not be granted away by its legislature, unless by express terms, or words equivalent in law.³

The most constant and strenuous discussion was maintained of the Commerce clause, indicating the enormous in-

¹ 94 U. S., 155 (1876). Confirmed in *Dorr v. Beidelman*, 125 U. S., 680 (1887). The duties of railroad companies were stated in the *Express Cases*, 117 U. S., 1 (1885).

² 116 U. S., 307 (1886).

³ The principle of the *Granger Cases* was substantially modified, and, in the opinion of some of the Justices, practically overruled by *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S., 418 (1889). *Minneapolis Railway Co. v. Minnesota*, *Ibid.*, 467 (1890).

crease and expansion of the business interests of the country. The first important decision affecting inter-State commerce, is that of *Welton v. The State of Missouri*,¹ in which it was held that where a license tax was required under the law of a State for the sale of goods brought from other States, while no similar tax was laid on sales of similar goods the product of the State itself, the law was unconstitutional and void. The power of Congress to regulate commerce was intended to prevent discriminations, and to cover property transported from other States, until it had mingled with and become a part of the general property of the country. It was protected even after it had entered a State from any burdens imposed because of its foreign origin. "The non-exercise by Congress of its power, its inaction upon this subject when considered in respect to commerce, is equivalent," said Mr. Justice Field, "to a declaration that inter-State commerce shall be free and untrammelled."

This was followed by *Henderson et al. v. The Mayor of the City of New York*,² in which Mr. Justice Miller elaborately reviewed all the cases of which *New York v. Miln* and the Passenger cases stood as examples, and reached the definite conclusion that although a State has authority to pass police regulations intended to secure protection against the consequences of a flood of pauperism, yet a statute which imposes a burdensome condition on a shipmaster, as a prerequisite to landing his passengers, with an alternative payment of a small sum of money for each one of them, was in reality a tax

¹91 U. S., 275 (1875). Other instances of determinations against State legislation discriminating against the products of other States are to be found in *Guy v. Baltimore*, 100 U. S. 434 (1879); *Tiernan v. Rinker*, 102 U. S., 123 (1880); *County of Mobile v. Kimball*, *Ibid.*, 691 (1880); and the earlier case of *Woodruff v. Parham*, 8 Wallace, 123 (1868).

²92 U. S., 259 (1875).

on the shipowner for the right to land such passengers, and in effect a tax on the passenger himself, since the shipmaster made him pay it in advance as a part of his fare. Such a statute amounted to a regulation of commerce, particularly when applied to passengers from foreign countries, and was, therefore, unconstitutional and void. Although it might be conceded that there was a class of legislation which might affect commerce both with regard to foreign nations and between the States, in regard to which the laws of the State might be valid, in the absence of action under the authority of Congress on the same subject, yet this could have no reference to matters which were in their nature National, or which admitted of a uniform system or plan of regulation, and while the Court did not undertake to decide whether a State might or might not, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, yet it was of opinion that to Congress rightfully and properly belonged the power of legislating on the whole subject.¹

A similar conclusion was reached in the case of *Chy Lung*

¹ Compare with this the able opinion of Mr. Justice Field in *County of Mobile v. Kimball*, 102 U. S., 691 (1880), declaring that State legislation affecting matters local in their nature, or intended to be mere aids to commerce, was not forbidden. The improvement of harbors, pilotage, beacons, buoys, etc., could be provided for by the States until Congress interfered. The same point was ruled in *Packet Co. v. Catlettsburg*, 105 U. S., 559 (1881). An interesting discussion by Mr. Justice Bradley is to be found in *Robbins v. Shelby County Taxing District*, 120 U. S., 489 (1886), setting aside as unconstitutional a license tax on "drummers," soliciting sales of goods on behalf of individuals or firms doing business in other States. But quarantine regulations were sustained in *Morgan v. Louisiana*, 118 U. S., 455 (1885). An ordinance as to washing and ironing in public laundries was sustained as a police regulation, *Barbier v. Connolly*, 113 U. S., 27 (1884). Soon Hing v. Crowley, *Ibid.*, 703 (1885).

v. *Freeman*,¹ where a California statute was stricken to the ground because the powers conferred upon State Commissioners were such as to bring the United States into conflict with foreign nations, and could only belong to the Federal Government. A mere police regulation, although limited in its terms, could not be extended so far as to prevent or obstruct classes of persons other than criminals and paupers from the right to hold personal and commercial intercourse with the people of the United States. The statute in this respect extended far beyond the necessity *in which the right, if it existed*, was founded, and invaded the right of Congress to regulate commerce with foreign nations, and was therefore void.

The State of New York again attempted legislation, but a tax on every alien passenger coming by vessel from a foreign country and holding the vessel liable for payment, was determined to be a regulation of commerce and void, even though the purpose was to aid the inspection laws of the State for the relief of paupers, the detection of criminals and the care of the sick.²

The time had come for Congress to regulate immigration, which was done by act of August 3, 1882, imposing on the owners of vessels bringing passengers from a foreign port into any port of the United States a duty of fifty cents for each passenger not a citizen. This was held to be a valid exercise of the power reposed by the Constitution in Congress to regulate commerce with foreign nations, and not a tax subject to the limitations imposed by that instrument. In fact it was a contribution to a fund designed to mitigate the evils incident to immigration.³

¹92 U. S., 275 (1875).

²*People v. Compagnie Générale Transatlantique*, 107 U. S., 59 (1882).

³*Head money cases*, 112 U. S., 580 (1884)

Although the purpose of the statute was highly humane and beneficial to the poor and helpless immigrant and essential to the protection of the people in whose midst they were deposited, the statute was assailed. Mr. Justice Miller in defending it, in one of those sentences which illuminate a darkened subject, said: "We are now asked to decide that the power does not exist in Congress—which is to hold that it does not exist at all—that the framers of the Constitution have so worded that remarkable instrument that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers and diseased persons without making any provisions to preserve them from starvation and its concomitant sufferings, even for the first few days after they have left the vessel." To this there could be but one reply. Freedom of transportation of passengers and freight between the States, it was said in *Gloucester Ferry Company v. Pennsylvania*,¹ implied exemption from all charges

¹ 114 U. S., 196 (1884). The cases illustrating the foregoing principles are numerous, but the following are selected as leading. The Western Union Telegraph Co. v. Massachusetts, 125 U. S., 530 (1887); Pickard v. The Pullman Southern Car Co., 117 U. S., 34 (1885); Philadelphia Steamship Company v. Pennsylvania, 122 U. S., 326 (1886); in which it was held that a tax on gross receipts of a steamship company was void because the company was engaged in transporting passengers and freight between States and from foreign countries. Wabash Railway Co. v. Illinois, 118 U. S., 557 (1886), preventing discriminations in charges of a railroad company for a greater or shorter distance in which a statute intended to regulate or to tax the transportation of passengers or property from one State to another was held to be void. Fargo v. Michigan, 121 U. S., 230 (1886), in which it was determined that a State tax on gross receipts of a railroad company for the carrying of freight and passengers into and out of and through the State is a tax on commerce among the States and is void, the business itself being inter-State commerce and therefore not taxable under the guise of tax on business transacted within its borders. In Sands v. Manistee River Improvement Company, 123 U. S., 288 (1887), the internal commerce of a State was defined. In Brown v. Houston, 114 U. S., 622 (1884), it was said that the term "imports and exports"

except such as were imposed as compensation for the use of property employed, or for facilities afforded for its use or as ordinary taxes on the value of property.

The final result of all the cases was well stated by Mr. Justice Bradley in *Leloup v. Port of Mobile*,¹ where, after showing that reference was necessary to the fundamental principles stated and illustrated by Marshall, he declared: "No State has the right to lay a tax on inter-State commerce in any form whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

"But this exemption of inter-State and foreign commerce from State regulation, does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from

as used in the Constitution had no reference to goods transported from one State to another, and that a tax on personal property after it had come within the State was sustainable. In *Bowman v. Chicago, &c. Railway Co.*, 125 U. S., 465 (1887), a law of Iowa forbidding common carriers from bringing intoxicating liquors within the State was set aside as a regulation of commerce on the ground that it was not a quarantine or police regulation. "It has never been regarded," said Mr. Justice Matthews, "as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce irrespective of its condition or quality merely on account of its intrinsic nature, and the injurious consequences of its use or abuse." Compare with this *Walling v. Michigan*, 116 U. S., 446 (1885), in which a State tax on an occupation discriminating against the introduction and sale of products of other States or against citizens of other States, was held to be void, and could not be sustained under the police power to regulate the sale of liquors. In *Smith v. Alabama*, 124 U. S. 465 (1887), a law requiring engineers of railroad trains to be examined and take out a license was sustained even as to those engaged in running trains between different States because the act did not burden or impede inter-State commerce but was intended to secure safety both to persons and property for the public.

¹ 127 U. S., 640 (1887).

regulating matters of local concern which may incidentally affect commerce such as wharfage, pilotage, taxation of property of a telegraph company within a State."

In the great case of the *Western Union Telegraph Company v. Texas*,¹ it was held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and inter-State business, and that the State could not place a specific tax on each message sent out of the State or sent by public officers on the business of the United States, although they might tax messages sent by private parties from one place to another exclusively within State jurisdiction.²

Under the same power of Congress to regulate commerce, the principles of the *Wheeling Bridge* case were affirmed in the great case of the *Brooklyn Bridge*, argued by the Hon. William H. Arnoux and Joseph H. Choate, in which it was held to be competent for Congress to authorize the construction of a bridge over a navigable water, and even though in fact it might be deemed an obstruction, in law it could not be so considered, because the obstruction had been made under proper authority.³

¹ 105 U. S., 460 (1881).

² This doctrine was in confirmation of that announced in *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S., 1 (1887), in which it was said that a Telegraph Company occupied the same relation to commerce as a carrier of messages as a railroad company did as a carrier of goods, that both were instruments of commerce, and that their business was commerce itself; that though they did their transportation in different ways, and their liabilities were in some respects different, yet they were both indispensable to those engaged to any considerable extent in commercial pursuits. See also *Western Union Telegraph Co. v. Pendleton*, 122 U. S., 347 (1887). *Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530 (1888).

³ *Miller v. Mayor of New York*, 109 U. S., 385 (1883). See also *Cardwell v. Bridge Co.*, 113 U. S., 205 (1884), confirming the doctrine of *Gilman v. City of Philadelphia*, holding that in the absence of legislation by Congress, a State might

In the *Virginia Coupon Cases*¹ it appeared that the State of Virginia had issued coupon bonds, and provided as a part of the right of the bondholders that the coupon should be receivable in payment of taxes, thus lodging in the hands of the creditor a self-executing remedy. It was held that this contract could not be impaired, and when a tax-collector to whom the coupons had been tendered, declined them, and distrained on the property of the taxpayer, he was personally liable in an action of detinue, and could not set up the later law of his State as a justification. It was further held not to be a suit against a State under the terms of the Eleventh Amendment; for as the Constitution had annulled the law of Virginia impairing the obligation of its contract, it was clear that the tax-collector was stripped of his official character, and was self-convicted of a personal violation of the plaintiff's rights, for which he must personally answer in damages. The doctrine of this case was confirmed in *Royall v. Virginia*,² where a license fee was required of an attorney for the practice of his profession payable under the laws of the State in coupons which were duly tendered and refused, and it was held that he might at once enter upon practice without license, and that any State law subjecting him to a criminal proceeding was void.³

An interesting distinction is presented by the two *Lottery Cases* between the effect of a charter by an ordinary legislative act and a Constitutional provision.

In the case of *Stone v. Mississippi*,⁴ the police powers of the States were considered, and it was held that the Legis-

authorize the bridging of a navigable stream within its limits. Again confirmed in *Willamette Iron Bridge Co. v. Hatch*, 125 U. S., 1 (1887).

¹ 114 U. S. 270 (1884).

² 116 U. S. 572 (1885).

³ Compare these decisions with *Hartman v. Greenhow*, 102 U. S., 72 (1880), and *Louisiana v. Jumel*, 107 U. S., 711 (1882)

⁴ 101 U. S., 814 (1879).

lature, by chartering a lottery company for twenty-five years, could not defeat the will of the people expressed in a Constitutional Amendment (adopted one year later than the charter) forbidding lotteries, lotteries being within the exercise of the police powers of the State, which extended to all matters affecting the public health or the public morals. It was not competent for the Legislature to make a contract by charter by which the State bargained away her police power. The opinion was delivered by Chief Justice Waite. The Mississippi Lottery was thus destroyed.

The Louisiana Lottery was sustained in the case of the *City of New Orleans v. Houston*,¹ in an opinion delivered by Mr. Justice Matthews, in which it was shown that, the grant of the charter of the Company being contained in the Constitution of the State, the Legislature, acting under that Constitution, could not contravene it, although the subject matter of such contract might have been embraced within the police powers of the State, the effect of the Constitutional provisions being to establish a contract binding upon the State for the specified period.

The career of Chief Justice Waite fitly terminated with the great *Telephone Cases*,² in which the claims of Alexander Graham Bell, as the inventor of this marvellous instrument of business communication, were sustained against all who claimed the distinction of priority of invention and sought to reap the golden harvest of profit which had accrued.

Several changes in the *personnel* of the Court had taken place during the period reviewed which it is our duty to notice.

Upon the death of Mr. Justice Clifford, Horace Gray,

¹ 119 U. S. 265 (1886).

² 126 U. S. 1 (1888).



Horace May

then the Chief Justice of Massachusetts, was appointed in his place, and duly commissioned upon the 20th of December, 1881. He is a native of Boston, and was born on the 24th of March, 1828, graduated from Harvard University in 1845, enjoyed the advantages of extensive travel in Europe, and returned to Harvard to enter its Law School. He subsequently read law under the direction of Judge Lowell, and obtained admission to the bar in 1851. In early life he identified himself with the founders of the Free Soil party, but the practice of his profession absorbing his attention, his subsequent connection with politics has been but nominal. He soon won a prominent position at the bar, conducting many important cases, and in 1854 was appointed Reporter of Decisions of the Supreme Judicial Court of Massachusetts, a position which he held until 1861, publishing sixteen volumes. While thus engaged he formed a law partnership, in 1857, with Judge Hoar, and continued in the discharge of active professional engagements and the enjoyment of an increasing practice until he was appointed by Governor Andrew, on the 24th of August, 1864, an Associate Justice of the Supreme Court of the State. In 1873 he became Chief Justice, as the successor of Chief Justice Chapman.

As a State Judge he delivered many interesting opinions on a great variety of subjects, the most important of which concerned the exemption of the United States from suit, the law of charities, ancient grants and boundaries, the effect of war upon private rights, the annexation of towns, and the liability of municipal corporations to private action, the Constitutionality of confirmatory statutes, contracts *ultra vires*, and the conflict of laws. Uniting to natural ability an unusual and thorough knowledge of law, acquired by careful study and ripened by experience, his accession to a place

upon the Supreme Bench of the Union was not only greeted with applause and commendation, but was recognized as a striking feature in a professional career, which resembled, in its steady rise and expansive progression, the promotion of an English lawyer to the most exalted honors. In character as well as learning, in age and robust vigor, in a majestic presence, he was fit for the work before him. As a presiding Judge he had been strict and punctilious—a trait which, although uncomfortable to the slovens and sluggards of the Bar, had proved an incentive to younger men to acquire technical correctness and precision. Anxious himself to learn, ambitious to preserve the precious stores of knowledge, and stimulating others to emulate his example, honorable, fearless and competent, he has become one of the most trusted guardians of the interests of justice.

In the Supreme Court his views have been chiefly in support of a high exercise of Federal authority, and he it was who, in the famous case of *Juillard v. Greenman*—establishing the Constitutionality of the Legal Tender Acts in time of peace—placed the cap-stone upon the majestic column representative of National Power, attaining a dizzy height to which even the boldest architect of the Constitution had never raised his eyes. Since then, whether it be the novelty requisite to support a patent, the status of Indians, the relations of guardian and ward, the conflict of laws, the Constitutionality of mill acts, the interpretation of wills, the nature of infamous crimes, the true meaning of contracts of shipment, the powers of courts martial, the exemption of the property of the United States from taxation by a State, the Civil law of Louisiana, the distinction between capital and income, the original jurisdiction of the Supreme Court over suits by a State, or the jurisdiction of the United States over the Guano Islands—

that called forth a judicial utterance or the entry of a final decree, he has in each instance expressed himself in terms dignified, firm and impressive, and supported his conclusions by reasons well sustained by authority. His dissenting opinions are but few in number, the best known of which are in the Arlington case,¹ and the Original Package case of *Leisy v. Hardin*.²

Upon the resignation of Mr. Justice Hunt, Samuel Blatchford, of New York, was commissioned as an Associate Justice upon the 22d of March, 1882. His grandfather, Samuel Blatchford, was an English dissenting minister, who came from Devonshire to the United States in 1795, and after several changes of residence established himself at Lansingburg in the State of New York. His father, Richard Milford Blatchford, was a native of Stratfield, Connecticut, a graduate of Union College, subsequently a school teacher, and still later a successful member of the bar of New York City, the financial agent as well as counsel of the Bank of England, and still later counsel for the Bank of the United States. He was also a member of the lower house of the Legislature of New York, and at the outbreak of the Civil War became a member of the Union Defence Committee of the city of New York, and was appointed by President Lincoln, in connection with John A. Dix and George Opdyke, a member of a committee, charged with the disbursement of Government moneys for the purpose of procuring soldiers for the Union Army. In 1862 he was appointed Minister Resident to the States of the Church, and remained in Rome until August, 1863. He was an intimate personal friend of Daniel Webster, and one of the executors of his will. He died at Newport, Rhode Island, in

¹ *United States v. Lee*, 106 U. S., 196 (1882).

² 135 U. S., 100 (1889.)

1875. The mother of Mr. Justice Blatchford was Julia Ann, daughter of John P. Mumford, Esq., of New York City.

Their son, Samuel Blatchford, was born in the city of New York on March 9th, 1820, was educated at a boarding school at Pittsfield, Massachusetts, and subsequently at the school of William Forrest, a well-known teacher in the city of New York, and at the grammar school of Columbia College, then under the superintendence of Charles Anthon, LL.D., Jay Professor of Greek and Latin. He entered Columbia College at the age of thirteen, and graduated in 1837, at the age of seventeen. He then became private secretary to William H. Seward, who had been elected Governor of New York, and held the position until his resignation in 1841, when he was appointed Military Secretary on the staff of the Governor. In the following year he was admitted to the bar, and practiced his profession in the city of New York, in connection with his father and his uncle, E. H. Blatchford, until November, 1845, when he removed to Auburn, and became the law partner of Governor Seward and Christopher Morgan. In 1854, removing to the city of New York, he formed a copartnership in connection with Clarence A. Seward and Burr W. Griswold, under the firm name of Blatchford, Seward and Griswold. Upon the 3rd of May, 1867, he was appointed District Judge of the United States for the Southern District of New York in the place of Samuel R. Betts, who had resigned. His opinions in the District Court are reported in the first nine volumes of Benedict's District Court Reports, and his opinions in the Circuit Court, while District Judge, are reported in volumes 5 to 14 of Blatchford's Circuit Court Reports. On the 4th of March, 1878, he was appointed Circuit Judge of the Second Judicial Circuit in the place of Alexander S. Johnson, deceased, and his opinions, since March, 1882, in the



Samuel Blechman

Circuit Court, are reported in volumes 14 to 24 of Blatchford's Circuit Court Reports, and in the "Federal Reporter." In 1867 the degree of LL.D. was conferred upon him by his Alma Mater, and he was chosen Trustee, which position he still holds. In 1852 he commenced the publication of his series of Reports of the Circuit Courts of the United States within the Second Circuit, and has published twenty-four volumes of such Reports. As an Admiralty Judge he ranks among the foremost in the land, having considered and determined questions as to the rules of navigation on the high seas, as to excessive speed of steamers on the high seas in a fog, as to whether damage to a cargo by rats is a peril of the sea, as to process of foreign attachment in admiralty, as to re-insurance of a charter party, as to jurisdiction in admiralty of damages not done on the water, and as to the liability to a seizure in admiralty, for a maritime tort, of a steam-tug belonging to a municipality and employed exclusively in public duties. As a patent lawyer he is clear-headed and sensible, determining, among other notable cases, the validity of letters patent for insulating telegraph wires by gutta-percha, and the liability of a common carrier for infringing a patent, when it carried the infringing article, which was to be sold at its destination for use. Besides these he adjudicated numerous questions in bankruptcy, questions of copyright and libel, the power of the President to cancel a pardon before it had been delivered to the prisoner, the legality of the Brooklyn Bridge as a structure suspended over navigable waters, the validity of a statute of New York discriminating in rates of wharfage in favor of canal-boats of the State, and many kindred controversies. Fully equipped by such a varied judicial experience in the busiest Circuit of the nation for dealing successfully

with the complex questions of Federal jurisprudence, he brought to the Supreme Bench not only ample learning, but an unusual degree of ready ability to meet problems as they arose. His appointment was received with hearty and universal approval. His judicial style is clear, but hard and dry, lacking compression and nervous energy, but it is vain to expect the *verba ardentia* when discussing the liens which may be made by a Court to take precedence of the lien of a railroad mortgage, or when a collector of customs will not be personally liable for a tort committed by his subordinates. His accuracy, care, impartiality and firmness are alike conspicuous, whether he states the law relating to the re-issue of patents, or subjects the most powerful railroad corporation in the land to the provisions of a State Constitution.

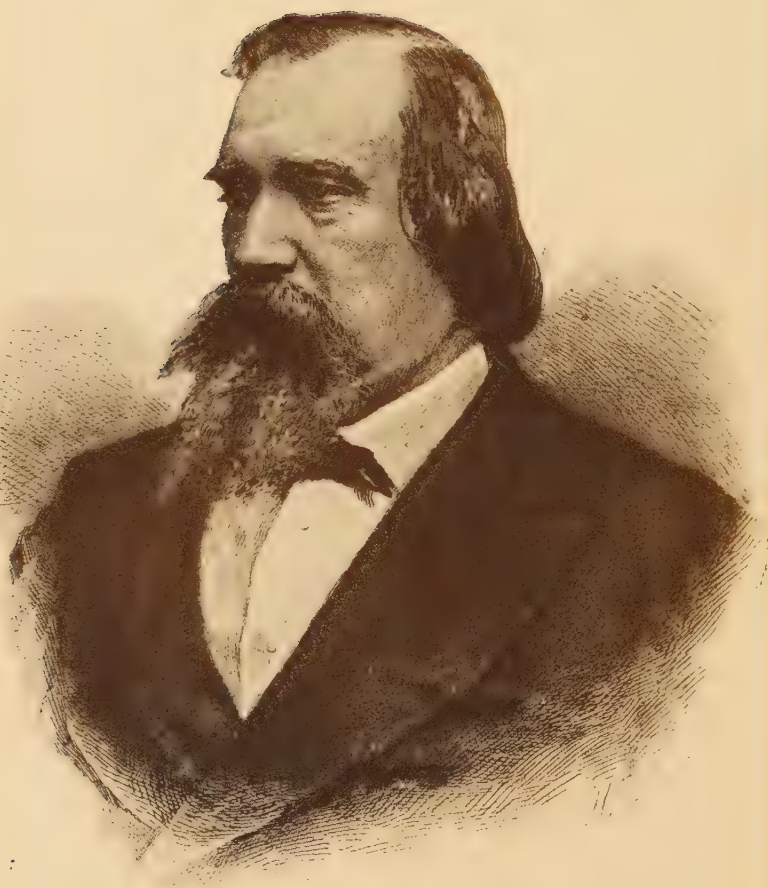
The successor of Mr. Justice Woods was Lucius Quintus Cincinnatus Lamar, of Mississippi, who was duly commissioned as an Associate Justice upon the 16th of January, 1888. His father, who bore the same name, was himself an eminent jurist, a Judge of the Supreme Court of Georgia and an eloquent speaker. Of him it was said by a member of the highest Court in that State: "From the day of his election to that of his lamented death, he discharged the duties of his office with signal ability and with public applause, which few in judicial stations have had the good fortune to receive." His distinguished son was born upon the 17th of September, 1825, in Putnam County, Georgia, and upon his father's death was taken to Oxford, Mississippi, where he received his early education. He was a graduate of Emory College, Georgia, in 1845, and having studied law in Macon, was admitted to the bar in 1847. He then returned to Oxford, and held the place of Adjunct Professor of Mathematics in the University of Mississippi, remaining there but

a few years, when he resigned, and resumed the practice of the law in Covington, Georgia. Whilst in excellent business for so young a man, he was elected to the Georgia Legislature in 1853, but the following year returned to Mississippi, and settled upon his plantation in Lafayette. In 1857 he was elected a member of Congress as a Democrat, and served until 1860, winning distinction, when he withdrew from Congress to take part in the Secession Convention of Mississippi, and subsequently entered the Confederate Army as Colonel of the Nineteenth Mississippi Regiment. He took an active part in many of the engagements of the Army of Northern Virginia, but was compelled to retire on account of ill health. He was then sent as Commissioner to Russia; but on arriving in Europe, in 1863, circumstances had so changed that the success of his mission was not a possibility. At the close of the war he returned to Mississippi, and in 1866 held the position of Professor of Political Economy and Social Science in the University of that State. In 1867 he was transferred to the Chair of Law, and finally returned to the bar.

In 1872, though engaged in a large practice, he was elected to Congress, and his disability on account of having borne arms against the Union was removed after his election. For the first time in many years a Democratic House of Representatives assembled, and Mr. Lamar, being chosen to preside over the Democratic Caucus, delivered an able and noteworthy address, outlining the policy of his party. His leadership was marked and masterly, and fixed the gaze of the nation. In 1874 he was re-elected, and spoke on critical occasions with power and effect. In 1876 he became a Senator of the United States, sharing in the debates only on important questions, and then, maturely prepared, as he never failed to be, his arguments were sustained by a

closeness of logic and an eloquence of style which won for him the attention and respect of both parties. He insisted that, as integral members of the Federal Union, the Southern States have equal rights with those of the North, whilst they were bound by both duty and interest to look to the general welfare and to support the honor and credit of a common country. He was also a zealous friend of public improvements, and especially of the Mississippi River and the Texas and Pacific Railroad. He exercised great independence of thought, and at one time, when instructed by the Legislature of his State to vote upon the currency question against his convictions, he refused to obey, boldly appealed to the people, and was triumphantly sustained. Upon the 5th of March, 1885, he was appointed Secretary of the Interior in the Cabinet of President Cleveland, and delivered many important opinions affecting the public lands.

As a jurist, he has taken high rank, his opinions being marked by scholarship and careful study of principles and of cases. One of his colleagues, upon being asked whether he had met the expectation of his friends, replied: "Fully. Mr. Cleveland made no mistake in appointing him. Whatever doubts existed as to his fitness for the Supreme Bench growing out of his long political and parliamentary career and absence from the active practice of his profession, have wholly disappeared. This will be conceded by all who have read his opinions. He has sound judgment, a calm temperament and a strong sense of justice. He possesses the judicial faculty in a very high degree. He takes broad, comprehensive views of legal and Constitutional questions, and states his conclusions with unusual clearness and force, and in language most aptly chosen to express the precise idea of his mind. His brethren are greatly attached to him." Upon another occa-



L. D. C. Lamm

sion one of his judicial associates remarked: "Your differentiation of cases where a State may and may not be sued is the best I have seen. The case seemed to me a difficult one, and I should not have suspected that you did not enjoy writing opinions. This is excellent."¹ Of the same case the oldest Justice now upon the bench wrote as follows: "I think that your summary of the Constitutional principles applicable to the reciprocal relations of Article I, Section 10, and the Eleventh Amendment of the Constitution, is so clear that it would suffer from abridgment," while of a recent case involving the question of contingent or prospective profits, it was said: "Your annunciation of the principles applicable to the question of profits is unusually clear and concise."²

The logical power of Mr. Justice Lamar, his striking talents as a rhetorician, his clearness of vision in detecting the true point in controversy, and his tenacious grasp upon it through all the involutions of argument, his familiarity with adjudged cases, his well-defined conception of the nature of the General Government and the distribution of its powers under the Constitution are best displayed in his dissenting opinion in *In re Neagle*, in which, unswayed by horror or resentment at the atrocious attempt to assassinate Mr. Justice Field, he insisted that before jurisdiction of the crime of murder could be withdrawn from the tribunals of the State where the act was perpetrated into the Federal Courts, it was necessary to show some law, some statute, some Act of Congress which could be pleaded as an authoritative justification for the prisoner's act, and that no implied power existed in the President or one of his subordinates to substitute an order or direction of his own, no matter how lofty the motive or commendable the result.

¹ *Pennoyer et al. v. McConnaughy*, April 20, 1891.

² *Howard et al. v. The Stillwell and Bierce Manufacturing Company*, March 16, 1891.

CHAPTER XX.

THE COURT COMPLETES THE WORK OF THE FIRST CENTURY OF ITS EXISTENCE:.

1888-1890: DEATH OF CHIEF JUSTICE WAITE: APPOINTMENT OF MELVILLE W. FULLER AS HIS SUCCESSOR: SKETCHES OF CHIEF JUSTICE FULLER AND OF ASSOCIATE JUSTICES BREWER AND BROWN: GENERAL CHARACTER OF CASES CONSIDERED: INTER-STATE COMMERCE: *LEISY v. HARDIN*, THE ORIGINAL PACKAGE CASE: POLICE REGULATIONS AS TO LIQUOR LAWS: INDEPENDENCE OF EXECUTIVE OFFICERS: RIGHT OF DEBTOR TO INSURE HIS LIFE: POWER OF COURTS TO PUNISH CONTEMPTS: INDIAN TRIBES: CONSTITUTIONAL CONTROL OF RAILROADS: MORMON CHURCH CASE: SUITS AGAINST A STATE: EX POST FACTO LAWS: CRUEL AND UNUSUAL PUNISHMENTS: MODIFICATION OF GRANGER CASES: EX PARTE TERRY: IN RE NEAGLE: PEACE OF THE UNITED STATES: TELEPHONE CASES: THE BAR OF THE SUPREME COURT: CONCLUSION.

THE death of Chief Justice Waite occurred on the 23rd of March, 1888, and Melville Weston Fuller, of Illinois, was duly commissioned as his successor upon the 20th of the following July.

The ancestors of Mr. Fuller were among the earliest and sturdiest settlers of New England. One of them was the celebrated Thomas Weld, a graduate of Cambridge University, England, who became the first minister of the first church of Roxbury, now a part of Boston, and was known as the "Preacher" when Eliot, the Apostle, was the "Teacher." His grandson was the famous Habijah Weld, who is described in Edwards' "Travels in New England" as an orator of great virtue and power and "a perfect Boanerges in the pulpit." His daughter, Hannah, married the Rev. Caleb Fuller, a graduate of Yale, and a grandson of that distinguished citizen of Dedham who had married the sister of the proscribed patriot and bold captain, Daniel Fisher, who in 1682 was the



W. M. Kelly

Speaker of the General Court, and was prosecuted by the British government for sedition. Another daughter married an ancestor of the late Chief Justice Shaw, of Massachusetts, so that the rugged qualities of leadership which characterized the old Puritan preacher, have been honorably perpetuated by his descendants. The grandfather of the present Chief Justice of the United States was the Hon. Henry Weld Fuller, a native of Middletown, a classmate in Dartmouth College of Daniel Webster, subsequently a lawyer of renown, and at his death a Judge of Probate in Kennebec County, Maine. His father was Frederick Augustus Fuller, a graduate of the Harvard Law School, and a sound lawyer, whose advice was much sought after. His mother was Catharine Weston, a daughter of the Hon. Nathan Weston, an eminent Judge of the Supreme Court of Maine, and for many years Chief Justice of the State. Descended on both sides from a race of lawyers, inheriting the well-trained faculties, as well as the traditions, of a long line of jurists and orators, it is not surprising to find in the most distinguished of its members ample legal knowledge, forensic skill, stirring eloquence, scholarly habits and convincing logic,—qualities which made him pre-eminent at the Bar of the great West, and, added to his professional experience, have fitted him to succeed the lamented Waite.

Melville W. Fuller was born in Augusta, Maine, on the 11th of February, 1833. He entered Bowdoin College at an early age, and graduated in 1853. He began the study of the law almost immediately under the direction of his uncle, George M. Weston, at Bangor, and also attended a course of lectures at the Harvard Law School. In 1855 he formed a legal copartnership with his uncle, Benjamin A. G. Fuller, at Augusta, with whom he was also associated as editor of "The

Age," a leading Democratic paper. In the following year he became President of the Common Council of his native town, and also served as City Solicitor. Although meeting with remarkable success and enjoying the most enviable prospects, he resolved, with the enterprising spirit of a pioneer, upon a removal to the West, and towards the close of the year 1856 established himself in Chicago. Here he was engaged in active practice for thirty-three years, rising gradually to the highest rank, and taking part in all the important arguments of the time. In the famous Cheney case he greatly distinguished himself, defending the Bishop before an ecclesiastical council against a charge of canonical disobedience, and astonishing his hearers by his extraordinary knowledge of ecclesiastical law, and his familiarity with the writings of the Fathers of the Church. His argument of the same case before the Supreme Court of Illinois has been pronounced a masterpiece of forensic eloquence and skill.

His practice was of the most varied and general character, embracing cases in every kind of tribunal, both State and National. His first case before the Supreme Court of the United States was that of *Dows v. Chicago*,¹ an attempt to restrain by bill the collection of a tax upon shares of the capital stock of a bank; the first case that he argued in person was that of the *Traders' Bank v. Campbell*,² involving the interesting question of when a judgment against a bankrupt constitutes a fraudulent preference. In the first case heard by Chief Justice Waite, that of *Tappan v. The Merchants' National Bank of Chicago*,³ he argued, though unsuccessfully, that the power of a State to tax stockholders in a National bank did not extend to non-resident stockholders,

¹ 11 Wallace, 108 (1871).

² 14 Wallace, 87 (1872).

³ 19 Wallace, 490 (1874).

while his last case, which was not decided until after he had taken his seat upon the bench, was that of *Railway Companies v. The Keokuk Bridge Co.*,¹ in which it was held that a contract made by the President of a railroad company in its behalf to pay certain sums for the use of a railway bridge across the Mississippi River between Illinois and Iowa, the terms of which had been communicated to the Directors and stockholders, and not disapproved by them within a reasonable time, was not *ultra vires*, but was binding upon the corporation.

His participation in politics has been slight. In 1861 he was a member of the State Constitutional Convention of Illinois, and in 1862 he served for a single term in the Legislature. He has been chosen as a delegate to the Democratic National Conventions of 1864, 1872, 1876 and 1880.

A ripe scholar in the classics, familiar with several European languages, diligent in research, fluent in speech and ready with his pen, he has attained a high reputation as an orator, and has delivered many notable addresses. Of these the most important was in commemoration of the Inauguration of George Washington as First President of the United States, delivered before the two Houses of Congress on the 11th of December, 1889;² an oration characterized by ardent patriotism, descriptive power, historic spirit and lofty eloquence.

The Northwestern University in 1884, and Bowdoin in 1888, conferred upon him the degree of LL.D. He presides with dignity and grace over the deliberations of the tribunal, and is known to the Bar as a man of amiable disposition and generous impulses.³

¹ 131 U. S., 371 (1889).

² Appendix to 132 U. S., 707.

³ Sketch of Chief Justice Fuller, "The Green Bag," No. 1, Vol. I, p. 1; Chicago "Legal News," Vol. XX, p. 291; Appleton's "Cyclopædia of American Biography;" private letters.

The death of Mr. Justice Matthews upon the 22d of March, 1889, created a vacancy which was filled by the appointment, in December of the same year, of David Josiah Brewer, who was duly commissioned upon the 6th of January, 1890. He was born in Smyrna, Asia Minor, on the 20th of June, 1837, and was the son of the Rev. Josiah Brewer and Emilia A., a sister of David Dudley, Stephen J., and Cyrus W. Field. His parents were missionaries to the Levant, and returned to this country when he was still an infant. His early education was received in the schools of Connecticut, and in 1851 he entered Wesleyan University at Middletown, where his father then lived, but afterwards went to New Haven, and graduated from Yale College in 1856, with high honors. Upon leaving Yale he entered the law office of his uncle, David Dudley Field, in New York City, in which he spent one year as a student, and then completed his legal studies in the Albany Law School, from which he graduated in the class of 1858. In the Fall of that year he went West, and after a residence of a few months in Kansas City started up the Arkansas Valley for Pike's Peak and Denver. Returning to Kansas in June, 1859, after a short visit home he established himself in Leavenworth, and resided there until removing to Washington in January of 1890.

In 1861 he was appointed United States Commissioner. In the following year he was elected Judge of the Probate and Criminal Courts of Leavenworth County. In 1864 he was elected Judge of the District Court for the first judicial district of Kansas, and in 1868 served as County Attorney. Being interested in educational matters he became a member of the Board of Education of Leavenworth City in 1863, and in 1865 became President of the Board, and still later was Superintendent of the public schools. During 1862 and 1863 he was secre-



D. J. Brewer

tary of the Mercantile Library Association of Leavenworth, and its President in 1864. In 1868 he became President of the State Teachers' Association. In 1870 he was elected a Justice of the Supreme Court of Kansas, was re-elected in 1876, and again in 1882. In March, 1884, he was appointed Judge of the Circuit Court of the United States for the Eighth Circuit, and in parting from his former associates of the State Bench, wrote an affectionate letter of farewell, expressing his appreciation of the assistance he had received from his colleagues and his regret upon parting from them.

While a State Judge he wrote an opinion dissenting from the majority of the Court upon the question of the power of a municipality to issue bonds in aid of railroads,¹ and wrote the opinion of the court ruling that women were eligible to the office of County Superintendent of Public Instruction,² since which time the State has had from one to a dozen women Superintendents in the various counties. In the Prohibitory cases³ he sustained the proceedings by which the Prohibitory Amendment was adopted as a part of the State Constitution, and in the Liquor cases⁴ explained and sustained the statutes which were intended to carry it into effect. As a Circuit Judge he ruled that a brewery built when the law sanctioned and protected the manufacture of beer, and which was constructed with special reference to such manufacture, and which could not, without great loss, be adapted to any other purpose, could not, after a change of policy in the State, by which the manufacture of beer was prohibited, be stopped from running, until the amount of the loss had been estimated and paid to

¹ State *ex rel.* v. Nemaha County, 7 Kansas, 549 (1871).

² Wright v. Noel, 16 Kansas, 601 (1876).

³ 24 Kansas, 700 (1881).

⁴ 25 Kansas, 751 (1881).

the proprietor,¹ a judgment which was subsequently reversed by the Supreme Court of the United States.² He also sustained the title to the Maxwell Land Grant, the largest private land grant which has ever been sustained in this country,³ a judgment which was afterwards affirmed by the Supreme Court.⁴ He also enjoined, upon the petition of certain railroad companies, the Railroad Commissioners of the State of Iowa from putting into force a schedule of rates so low that the earnings of the roads thereunder would not be sufficient to pay operating expenses and interest on their bonds, and was the first to challenge the dicta in the Granger cases as to the unlimited power of the State Legislature over rates, a proposition which has since been sustained by the Supreme Court.

His perceptive faculties are quick and he works with facility and ease. The duties of his various judicial positions have been discharged with untiring industry, acknowledged ability and impartiality. He is energetic in the dispatch of business and remarkable for executive ability. His social qualities are of a high order, and he is renowned for his skill as a *raconteur*. Although urged to become a candidate for the vacancy created by the death of Mr. Justice Matthews, he declined, saying "The office was not one to be contested, being too high and sacred;" but his eminent qualifications were called to the attention of the President, and it has been widely reported that his courtesy and generosity towards his chief competitor, Judge Henry B. Brown, of Michigan (now his associate upon the bench of the Supreme Court of the United States), who had been his classmate at Yale, so impressed the

¹ *State v. Walruff*, 26 Federal Reporter, 178 (1886).

² *Kidd v. Pearson*, 128 U. S. (1888).

³ *United States v. Maxwell Land Grant Co.*, 26 Federal Reporter, 118 (1886).

⁴ 121 U. S. 325 (1887).



Henry B. Brown

Executive with his fairness, as to secure his promotion. In character, temperament, learning, industry and experience, he has proved himself to be a worthy member of his distinguished family.

Through the death of Mr. Justice Miller, upon the 14th of October, 1890, a vacancy occurred which was filled by the appointment of Henry B. Brown, of Michigan, who was commissioned upon the 29th day of December, 1890. At the time of his appointment he was Judge of the United States District Court for the Eastern district of Michigan, and his is the only instance in recent times of the promotion of a District Judge to the highest judicial position in the land.

He was born in Lee, Massachusetts, upon the 2d of March, 1836. His father was a manufacturer, and his mother was a woman of exceptional strength of character. He was educated at Yale, from which he graduated in 1856, with Chauncey M. Depew and his present associate, Mr. Justice Brewer, as classmates, and with Mr. Justice Shiras as a fellow collegian. At the close of his college course he spent a year in Europe studying languages and traveling extensively on the Continent. Upon his return he pursued a course of study at the Law School at New Haven, but received his degree from the Harvard Law Department. In 1859 he went to Detroit, and there entered the office of a prominent law firm, in which he continued until April, 1861, when he was appointed Deputy United States Marshal and Assistant District Attorney. He held the latter office until 1868, when Governor Crapo appointed him to fill a vacancy in the Wayne Circuit Court, the highest court in the City of Detroit, with law and chancery jurisdiction. Returning to the practice of his profession, he formed a partnership with the late J. S. Newberry and Ashley Pond. In 1875 he was appointed by President Grant District Judge of the United States, succeeding Judge J. W. Longyear.

His practice was almost exclusively in the United States Courts, and his knowledge of admiralty proceedings, together with his familiarity with the domain of criminal law made him eminent in those branches.¹

As an admiralty Judge he has tried a far larger number of cases than any other Judge upon the Bench, and is a recognized authority in this particular field. A scholar by taste and lifelong habit, and a close student of Constitutional law, he published in 1887, in the "American Law Review," a remarkable paper upon "The Dissenting Opinion of Mr. Justice Daniel," which had something to do with his appointment to the Supreme bench. He has delivered several addresses, a notable one being a paper upon "Judicial Independence," read before the American Bar Association at its Twelfth Annual meeting,² in which he reviewed and criticised the statutes in many of the Southern and Western States which were intended to secure the unbiased opinion of juries upon facts, and an easy and accurate settlement of bills of exception, "but the effect of which was to shear the judge of his proper magisterial functions, and to reduce him to the level of a presiding officer, or the mere mouth-piece of counsel." In this paper he takes high ground and reviews the history of the Judiciary from its earliest days to the present time, contending for a tenure of office which would remove the Judges from temptation and as far as possible from

¹ His most important decisions are in *Ex parte* Thompson, 1 Flippin, 507 (1876); National Bank of Paducah, 2 *Ibid.*, 61 (1877); The Manitoba, 2 *Ibid.*, 241 (1878); Phillips v. Detroit, 4 Banning and Arden Patent Cases, 347 (1879); Burton v. Stratton, 12 Federal Reporter, 696 (1882); The James P. Donaldson, 19 *Ibid.*, 264 (1883); The Alberta, 23 *Ibid.*, 807 (1885); United States v. Clark, 31 *Ibid.*, 710 (1887); *Ex parte* Byers, 32 *Ibid.*, 404 (1887); Saginaw Gas Light Co. v. Saginaw, 28 *Ibid.*, 529 (1886); Navigation Co. v. Insurance Co., 26 *Ibid.*, 596 (1886); Brush Electric Co., 43 *Ibid.*, 533 (1890); Cope v. Cope, 137 U. S. 682 (1891).

² Report of the Twelfth Annual Meeting of the American Bar Association held at Chicago, Illinois, 1889, p. 266.

suspicion. His style is clear, emphatic and at times picturesque. More recently he delivered a memorial address on the life of the late Chief Justice Campbell, of Michigan, a jurist of commanding power, and of extraordinary purity of character.

Under the presidency of Mr. Fuller as chief Justice, the Court has extended, strengthened and illustrated the system established under his predecessors. Although no novel doctrines have been introduced, nor has there been any departure from well beaten paths, yet a noticeable expansion of Federal power occurred in the establishment of the doctrine of a Peace of the United States, and the declaration that there existed an implied authority on the part of the Executive to protect the Federal Judges against violence whenever there was a just reason to believe that they would be exposed to personal danger while executing the duties of their office. At the same time, in the interpretation of the Commerce clause, high water mark was reached. The work of the Court has been performed with loyalty to the Constitution, fidelity to the principles of Nationality, and a close, but not servile, adherence to former well-considered decisions. Legal maxims have been applied to a vast and ever increasing mass of business with a degree of skill and intelligence which are worthy of the past history of the tribunal.

In the *Western Union Telegraph Company v. Commonwealth of Pennsylvania*,¹ the Chief Justice affirmed the doctrine that a Commonwealth was not entitled to recover taxes upon telegraph messages except in respect to those transmitted wholly within the State, the distinction being drawn between messages transmitted from points within to points without the State, which were elements of inter-State commerce, and, therefore, not subject to Legislative control; but messages

¹ 128 U. S. 39 (1888).

between points entirely within the State were elements of internal commerce, solely within the limits and jurisdiction of the State, and, therefore, subject to its taxing power.¹

In *McCall v. California*,² in an opinion by Mr. Justice Lamar, all the cases were reviewed, and it was declared that no burden could be placed by States on commerce with foreign nations, or among the several States, nor could any burden be imposed on the instruments or subjects of commerce, nor a license fee be exacted from persons in commercial pursuits.³ And in *Asher v. The State of Texas*, a law imposing a tax on commercial drummers, and requiring them to obtain licenses was held to be void as applied to citizens of other States soliciting trade.⁴

But the most memorable opinion delivered by the Court since the days of Taney, when the same question was discussed, and one which attracted universal attention and provoked some excitement, was that of the celebrated "Original Package Case" of *Leisy v. Hardin*,⁵ in which the decision in *Peirce v. New Hampshire*⁶ was distinctly overruled, it being held that a statute of a State which prohibited the sale of any intoxicating liquor, except for certain specific purposes under a license from a county court, was, as applied to a sale by the importer in the original packages or kegs, unbroken or unopened, of liquors manufactured and brought in from another State, unconstitutional and void, Chief Justice Fuller reviewing every case relating to the Commerce clause

¹ Compare *Western Union Telegraph Company v. Texas*, 105 U. S. 460 (1881); *Ratterman v. Western Union Telegraph Co.* 127 U. S. 411 (1889). ² 136 U. S. 105 (1890).

³ To same effect see *Minnesota v. Barber*, 136 U. S. 313 (1880). In *Home Insurance Co. v. New York*, 134 U. S. 594 (1890) the power of a State to tax the corporate franchise, or business of all corporations, foreign or domestic, doing business in a State, measured by the extent of the dividends of the corporation in a current year, was upheld.

⁴ 128 U. S. 129 (1888).

⁵ 135 U. S. 100 (1890).

⁶ 5 Howard, 504 (1847).

from the time of *Gibbons v. Ogden* and *Brown v. Maryland*, to the present day.

It was shown that in Congress was vested the power to prescribe the rule by which commerce with foreign nations and among the several States was to be governed,—a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution; a power co-extensive with the subject on which it acts, which cannot be stopped at the external boundary of a State, but must enter it, and be capable of authorizing the disposition of those articles which it introduced, so that they might become mingled with the common mass of property within the State. It was, therefore, asserted that while, by virtue of its jurisdiction over persons and property within its limits, a State might provide for the security of the lives, limbs and comfort of persons, and the protection of property so situated, yet a subject matter which had been confided exclusively to Congress was not within the jurisdiction of the police power of the State unless placed there by Congressional action.

After examining the decision of Chief Justice Taney in the New Hampshire case, and conceding the weight properly to be ascribed to the judicial utterances of that eminent jurist, Chief Justice Fuller felt himself constrained to say that the distinction between subjects in respect to which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, did not appear to him to have been sufficiently recognized by Taney in arriving at the conclusions he announced. The later authorities had distinctly overthrown the authority of that case. After examining in detail every decision pronounced by the Court he declared:

"The conclusion follows that as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the Courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. . . . Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of inter-State commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

From this judgment and reasoning Justices Gray, Harlan and Brewer dissented, the former delivering an elaborate opinion in which he insisted that the New Hampshire case in Taney's time had established a wise and just rule, and was decided upon full argument and great consideration, and ought, therefore, to be followed; that the power of regulating or prohibiting the manufacture and sale of intoxicating liquors properly belonged, as a branch of the police power, to the legislatures of the several States, and could be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and could not practically, if it could Constitutionally, be wielded by Congress as part of a national and uniform system; that the statutes in question, enacted by the State of Iowa, to protect its inhabitants against the physical, moral and social evils attending the free use of intoxicating liquors, were not aimed at inter-State

commerce, had no relation to the movement of goods from one State to another, operated solely on intoxicating liquors within the territorial limits of the State, did not include all such liquors without discrimination, and did not even mention where they were made, or whence they came.¹

At the same time, while sustaining the power of Congress to regulate inter-State commerce in relation to the liquor traffic, the Court has been careful to uphold in each and every case the authority of States to regulate or suppress the evils resulting from the manufacture and sale of liquor. Of these cases that of *Kidd v. Pearson*² stands as an example, in which it was held, in an opinion by Mr. Justice Lamar, that a law of Iowa authorizing the abatement as a nuisance of a distillery used for the unlawful manufacture and sale of intoxicating liquors, did not conflict either with the Constitution of the United States by undertaking to regulate commerce between the States, nor with the Fourteenth Amendment to the Constitution by depriving the owners of the distillery of their property without due process of law. It was shown that a State, in the exercise of its undisputed power of local administration, could enact a statute prohibiting within its limits the manufacture of intoxicating liquors, and that that right was not to be overthrown by the fact that the manufacturer in-

¹ It is a noteworthy circumstance how little of political bias prevails upon the bench; the strong National view was supported by the Chief Justice and Justices Field and Lamar, all of them Democrats, and the authority of the State was strenuously contended for by such Republicans as Justices Harlan, Gray and Brewer.

² 128 U. S. 1 (1888). The above decision was confirmed in *Lyng v. Michigan*, 135 U. S., 161 (1890), but the effect of these decisions was almost immediately counteracted by an Act of Congress upholding the exercise of the police powers of the States under circumstances similar to those discussed in *Leisy v. Hardin*. In *Wilkinson, Sheriff of Shawnee County, Kansas, v. Rahner*, a case decided May 26th, 1891, the Constitutionality of this Act of Congress was upheld, and the leading case, which has been reviewed in the text, becomes of historical value only.

tended to export the liquors when made. The language of the Court in the License Tax Cases,¹ that over the internal commerce and domestic trade of the State Congress had no power of regulation nor indirect control, was quoted with approval, and it was shown that no interference by Congress with the business of citizens transacted within the State was warranted by the Constitution, and that the fact that the article was manufactured for export to another State, did not of itself make it an article of inter-State commerce.²

In *Nashville, Chattanooga & St. Louis Railway Co. v. State of Alabama*,³ Mr. Justice Field sustained a State statute declaring that persons afflicted with color-blindness were disqualified for service upon railway lines within the State, and held that until Congress had legislated upon the qualifications, duties and liabilities of employes upon railway trains engaged in inter-State commerce, it was within the power of the State to provide against accidents on trains while within their limits.

The independence of the executive officers of the government in the discharge of their ordinary official duties, and their freedom from liability to coercion by mandamus, was established by Mr. Justice Bradley in the case of *United States v. Black*,⁴ where it was held that the Court had no right to review the decision of the Commissioner of Pensions in refusing a pension certificate, his decision having been confirmed by the Secretary of the Interior.

In *Bank of Washington v. Hume*,⁵ Chief Justice Fuller

¹ 5 Wallace, 470 (1866).

² See also *Eilenbecker v. District Court of Plymouth Co.*, 134 U. S., 32 (1890) and *Crowley v. Christensen*, 137 U. S., 86 (1890), in both of which the police powers of a State were sustained in the regulation, mitigation and suppression of the evils resulting from the manufacture and sale of intoxicating liquors. Another instance where the public powers of the State were sustained is to be found in the *Oleomargarine Case of Powell v. Pennsylvania*, 127 U. S., 678 (1888).

³ 128 U. S. 96 (1888).

⁴ 128 U. S. 40 (1888).

⁵ 195 (1888).

sustained the insurable interest of a wife and children in the life of the husband by deciding that the creditors of one who had insured his life for the benefit of his wife and children, had no interest in the proceeds of the policies, nor could they recover the premiums paid upon policies issued upon his life for the benefit of his wife and children in the absence of evidence from which a fraudulent intent on the part of the latter or the insurance company could be inferred. It was asserted that public policy justified a debtor in preserving his family from suffering and want, and that the support of wife and children constituted a positive obligation in law as well as in morals, and that they should be protected from destitution after a debtor's death, by permitting him to devote a moderate portion of his earnings to sustain a security for such support.

In the interesting case of *Ex parte Terry*,¹ which grew out of a contempt of the authority of the United States Circuit Court for the Northern District of California, under the circumstances noticed in our sketch of Mr. Justice Field, the Court dealt with the power to issue a *habeas corpus* for the purpose of inquiring into the cause of the restraint of the liberty of prisoners in jail under authority of the United States. The power of a Court to punish for contempt was declared to be inherent; a breach of the peace in open Court was a direct disturbance and a palpable contempt, which it was competent for the Judge presiding, immediately upon its commission in his presence, to proceed upon his own knowledge of the facts to punish without further proof, without issue or trial in any form.²

In close connection with the foregoing case is that known as *In re Neagle*.³ No case within the past ten years has at-

¹ 128 U. S. 289 (1888). ² Affirmed in *Savin, Petitioner*, 131 U. S. 267 (1889).

³ 135 U. S. 1 (1890).

tracted more attention. Neagle, a Deputy Marshal, had been directed by the Attorney General of the United States to guard the person of Mr. Justice Field, whose life was thought to be in danger. While the Judge was in a railway eating-house, upon his journey from one city to another, where he expected to discharge his judicial duties, Terry committed a violent assault and battery upon him, and so acted that Neagle, believing that the attack would result in the death of the Judge unless he interfered, shot him in the act. Neagle was seized by the Sheriff of the county upon the charge of murder, but presented to the Circuit Judge a petition praying for his discharge. This being granted, the Sheriff promptly appealed to the Supreme Court. In a most elaborate opinion by Mr. Justice Miller, it was held that the prisoner was not only justified in defending the Judge as he had done, but that in so doing he acted in discharge of his duties as an officer of the United States. Therefore he could not be guilty of murder under the laws of California. A Justice of the Supreme Court, in attending Circuit and in traveling from place to place, was as much in the discharge of duty imposed upon him by law as he was while sitting in Court trying causes. When attacked by Terry, he was entitled to all the protection which the law could give him. It was determined, in answer to the contention that there was no statute of the United States authorizing any such protection as that which Neagle was instructed to give, that any obligation fairly and properly inferrible from the Constitution of the United States or any duty of the Marshal derived from the general scope of his duties under the laws of the United States, was "a law" within the meaning of the phrase as employed in Section 753 of the Revised Statutes. It was held that the President of the United States,

charged with the duty of taking care that the laws be faithfully executed, possessed the implied power of taking measures for the protection of a Judge of one of the Courts of the United States, and that the Department of Justice, acting through the Attorney General, was the proper Department to set in motion the necessary means of protection. It was further declared that there was a Peace of the United States which was violated by an assault upon a Federal Judge while in the discharge of his duties, and that, in such a case, a Marshal stood in the same relation to the peace of the United States as the Sheriff of the county did to the peace of the State of California. It was the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws imposed upon them. Congress had made the writ of *habeas corpus* one of the means by which that protection was made efficient. Hence the Court reached the conclusion that the prisoner should be discharged from the power of the State Court to try him for any offence, because, in doing the act with which he was charged, he did no more than was necessary and proper for him to do. He could not, therefore, be guilty of a crime under the law of the State. Nor was there any occasion for any trial in the State Court, nor in any Court; for the Circuit Court of the United States, in entertaining the petition for a *habeas corpus*, was as competent to ascertain the facts as any other tribunal.

From this judgment Mr. Justice Lamar delivered an elaborate dissenting opinion, concurred in by the Chief Justice, planting himself upon the proposition that there were no implied powers granted by the Constitution to the Executive, and that there was no "law," such as was meant by the phrase in the Revised Statutes, unless some express statute

could be pointed to. Such being the case, the killing of Terry was not by authority of the United States, no matter by whom done, and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the State Courts to be tried.

“The question then recurs,” said he, “would it have been a crime against the United States? There can be but one answer. Murder is not an offence against the United States, except when committed on the high seas, or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the National Government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial, and give immunity from any liability for trial where he is accused of murder, unless an express statute of Congress is produced, permitting such discharge.”

A most important opinion delivered at this time, was that of Mr. Justice Miller in the case of the *United States v. The American Bell Telephone Company*,¹ a case argued by the most eminent special counsel, with a degree of learning and an exhaustive examination of authorities almost without parallel in the discussion of patent causes. After disposing of certain preliminary questions of pleading, it was held that the Circuit Court of the United States had jurisdiction in suits brought by the United States to set aside and cancel patents for inventions for frauds committed by the parties to whom they were issued, and that Congress did not intend by giving to private individuals the right to set up by way of defence to an action for infringement of a patent, that the patentee had surreptitiously obtained the patent or that he was not the first

¹ 128 U. S. 315 (1888).

inventor, to supersede the affirmative relief to which the United States is entitled in order to obtain the cancellation of a patent obtained by fraud. And the action of the lower Court in dismissing a bill filed in behalf of the United States was reversed, and the case remanded with directions to overrule the demurrer, with leave to the defendants to plead or answer within a time to be fixed by the Court.

An interesting question as to the right of a State to require physicians to procure certificates from a State Board of Health before attempting the practice of medicine, was considered by Mr. Justice Field in the case of *Dent v. State of West Virginia*,¹ and the Constitutionality of such a law was sustained, its object being to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under the authority of the State.

In *Reynes v. Dumont*² the nature of a banker's lien was elaborately discussed by Chief Justice Fuller. In *Gibbs v. The Consolidated Gas Company of Baltimore*³ it was held that a corporation could not disable itself by contract from performing the public duties which it had undertaken, and that no person could recover for services for procuring a contract which was forbidden by statute or by public policy, where he was privy to the unlawful design of the parties. An interesting question of trademark was discussed by the Chief Justice in the case of *Menendez v. Holt*.⁴

In the matter of *Gon-Shay-Ee*⁵ it was held, in an opinion by Mr. Justice Miller, that under the Act of March 3d, 1885, where a murder had been committed by an Indian within a Territory of the United States, that the offender was subject

¹ 129 U. S. 114 (1889). ² 130 U. S., 354 (1889). ³ 130 U. S., 397 (1888).

⁴ 128 U. S., 514 (1888).

⁵ 130 U. S., 343 (1889).

not to the criminal laws of the United States, but to the laws of the Territory. After a full discussion of the incidents of trial, and a review of the whole history of the relations between the United States and the Indian tribes,¹ it was shown that they were important, relating as they did to the question of jurisdiction, and concerning the life and liberty of the party against whom a crime is charged, and it was said to be of consequence that in the new departure which Congress had made of subjecting the Indians in a limited class of cases to the same laws which governed the whites within the Territories where they both resided, that the Indian should have at least all the benefits which might accrue from that change which transferred him as to the punishment for crime from the jurisdiction of his own tribe to the jurisdiction of the government of the Territory within which he lived.

In the case of the *Pennsylvania Railroad Company v. Miller*² in a most elaborate opinion by Mr. Justice Blatchford, it was held that neither the charter of the Pennsylvania Railroad Company nor acts supplementary thereto, constituted such a contract between the State and Company as exempted the latter from the operation of an article in the Constitution of Pennsylvania, which required that corporations invested with the privilege of taking private property for public use, should make compensation for property injured or destroyed by the construction or enlargement of their works, highways or improvements. Nor did such Constitutional provision as applied to the Company impair the obligation of any contract between it and the State in respect to cases arising afterwards. The basis of the decision was that the Company had accepted its original power subject to the general law of the State, and to

¹ See case of *Crow Dog*, 109 U. S., 556 (1883); *U. S. v. Kagama*, 118 U. S., 375 (1886).

² 132 U. S., 75 (1889).

such changes as might be made in such general law, and subject to future Constitutional provisions and future general legislation. Since there was no prior contract with it, exempting it from liability to such future general legislation in respect to the subject matter involved, no such exemption could be admitted to exist unless expressly given, or unless it followed by implication equally clear with express words.

A death-dealing blow was struck at Polygamy in the great case of *The Mormon Church v. The United States*,¹ sustaining an Act of Congress by which the charter of the Church of Jesus Christ of Latter Day Saints was repealed and abrogated, the seizure of its property directed, and its property bestowed upon the United States as *parens patriæ* to be devoted to other religious and charitable uses under the *cy prés* doctrine.

Other subjects were considered: as the suability of States,² *Ex post facto* laws,³ grants of power to municipal corporations to subscribe for stocks in railways,⁴ the validity of laws inflicting the penalty of death by electricity,⁵ which was held not to be a "cruel and unusual punishment;" while the effect of the Granger Cases was modified and softened,⁶ and a distinction drawn and pointed between cases where State Courts

¹ 136 U. S., 2 (1889). See also *Davis v. Beason*, 133 U. S., 333 (1889), and *Cope v. Cope*, 137 U. S., 682 (1891); in the latter case the right of polygamous children to inherit was sustained, on the ground of protection to innocent and unfortunate beings.

² *Hans v. Louisiana*, 134 U. S., 1 (1889); *North Carolina v. Temple*, *Ibid.*, 22, (1890) and *Louisiana v. Steele*, *Ibid.*, 230 (1890).

³ *Medley*, Petitioner, 134 U. S., 160 (1890).

⁴ *Hill v. Memphis*, 134 U. S., 198 (1890).

⁵ *In re Kemmler*, 136 U. S., 436 (1890).

⁶ *Chicago, etc., Railway Co., v. Minnesota*, 134 U. S., 408 (1890). *Minneapolis Railway Co., v. Minnesota*, *Ibid.*, 467 (1890.)

had or had not jurisdiction of offences growing out of elections for Presidential Electors and for members of Congress.¹

Boundaries between sovereign states were adjusted, and a controversy settled between Texas and the new territory of Oklahoma.² The Constitutionality of the famous reciprocity clause in the tariff Act of October 1, 1890, commonly known as the "McKinley Bill," was sustained in an elaborate opinion by Mr. Justice Harlan, although assailed on the ground that the bill did not pass in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President. It was held that it was not competent to use legislative journals to impeach an enrolled act, because this would be to expose the validity of Congressional enactments to the risk of being overturned by carelessness in keeping the Journal. It was also held that though Congress could not delegate its legislative power to the President, yet in the present case it had not done so in simply prescribing the evidence which should be admitted of a fact upon which the law should become operative. From this latter view, both Chief Justice Fuller and Mr. Justice Lamar dissented, while concurring in the conclusion reached upon the main question.³

The exciting controversy which arose in the House of Representatives as to the true method of determining a quorum, whether it should be ascertained by counting those physically present but not voting or whether those not voting were to be deemed absent from the floor of the legislative assembly, was examined in the case of *United States v. Ballin*⁴ and the rulings of Speaker Reed were fully sustained, by which those

¹ *In re Loney*, 134 (1890). *In re Green*, *Ibid.*, 377 (1890).

² *Nebraska v. Iowa*, 143 U. S. 359 (1891). *United States v. Texas*, *Ibid.*, 621.

³ *Field v. Clark*, 143 U. S. 649 (1891).

⁴ 144 U. S. (1891).

present were rendered powerless through a mere refusal to vote to obstruct legislation and arrest the progress of business.

The power of Congress to exclude from the mails all letters, postal cards, and circulars relating to the Louisiana Lottery, was fully upheld in an opinion by Chief Justice Fuller in a case entitled *In re Rapier*.¹ The cause was argued with consummate ability by Mr. James C. Carter and Assistant Attorney General Maury, and the discussion is among the most interesting and exhaustive that can be found in recent reports upon a question of Constitutional law. The preparation of the opinion had been assigned originally to Mr. Justice Bradley, but owing to his untimely death it was never delivered or perhaps even prepared by him.

Several cases sustaining the right of States to tax the capital stock of foreign corporations occurred, among which are to be found those subjecting the personal property of the Pullman Palace Car Company, even though employed in inter State Commerce, so far as the property itself was used within the border of the taxing State,² and the lines and other property of the Western Union Telegraph Company to taxation, and the opinions were delivered by Mr. Justice Gray, and dissented from by Justices Bradley, Field and Harlan on the ground that such a State law amounted to an incidental regulation of commerce.

The police power of a State over a business affected with a public interest providing for maximum charges for elevating

¹ 143 U. S. (1891) affirmed in *Hopner v. United States*, *Ibid.*, 207.

² *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18 (1890). *State of Massachusetts v. Western Union Tel. Co.* *Ibid.* 40. See also *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679; *Crutcheon v. Kentucky*, 141 U. S. 47; *Voight v. Wright*, 141 U. S. 62; *Ficklin v. Shelby County*, 145 U. S. 1.

grain was considered in *Budd v. State of New York*¹ and the rule announced in *Munn v. Illinois*² adhered to. The opinion of the Court was delivered by Mr. Justice Blatchford, and dissented from in a terse and powerful deliverance by Mr. Justice Brewer, in which Justices Field and Brown concurred.

The Chicago Anarchists were twice before the Court complaining that they had not been dealt with according to due process of law;³ the contract labor law was held not to apply to clergymen who had engaged to remove to the United States and serve Societies as rectors.⁴ Chinese exclusion was again illustrated,⁵ while an unsuccessful attempt was made to overturn the penal code of the State of Texas.⁶ Several electrocution cases from New York arose,⁷ while the Constitutionality of the Act of Congress known as the Original Package law, intended to obviate the consequences upon the police powers of the States of the decision of the Court in the famous case of *Leisy v. Hardin*⁸ was upheld.⁹

A contest as to the governorship of Nebraska, in which our naturalization laws were fully reviewed, occurred in *Boyd v. Nebraska*.¹⁰ A novel aspect of the Behring Sea controversy was considered;¹¹ and an application for a writ of prohibition to a lower Court to restrain the enforcement of a sentence of forfeiture and condemnation was refused, partly because it was

¹ 143 U. S. p. 517 (1891).

² 94 U. S. 113 (1876).

³ *Schwaby, Berggren and Fielden v. Illinois*, 143 U. S. 442 and 452 (1891).

⁴ *Church of the Holy Trinity v. U. S.*, 143 U. S. 457 (1891).

⁵ *Lau Ow Ben*, 144 U. S. 47 (1891).

⁶ *In re Duncan*, 139 U. S. 448 (1890).

⁷ *In re Jugiuro*, *In re Woods*, 143 U. S. 202 (1891).

⁸ 135 U. S. 100 (1889).

⁹ *In re Rahrer*, 140 U. S. 545 (1890).

¹⁰ 143 U. S. 13.

¹¹ *In re Cooper*, 143 U. S. 472, and the *Sylvian Handy*, *Ibid.*, 513 (1891).

a well settled principle that an application for a writ ought not to be made to review the action of a political department of the government, upon a question pending between it and a foreign power, and to determine whether the government was right or wrong, while diplomatic regulations were still going on. The oft-reiterated assertion that no common law offences against the United States existed was again announced in *United States v. Eaton*.¹

The case of *O'Neill v. Vermont*,² attracted great attention.

A citizen of New York was charged before a justice of the peace in Vermont with selling and giving away liquor against the laws of Vermont, was found guilty of four hundred and fifty-seven distinct offences, and sentenced to pay to the Treasurer of the State a fine of \$6140, the costs of prosecution taxed at \$472.96, and be confined at hard labor for one month, and in case the fine be not paid within a month, to undergo an imprisonment of twenty-eight thousand, eight hundred and thirty-six days—more than seventy-nine years—at hard labor. The Supreme Court of Vermont upheld the sentence. The Supreme Court of the United States, through Mr. Justice Blatchford dismissed the writ of error, mainly on the ground that the record did not present a Federal question. No point on the commerce clause of the Constitution, it was said, could be raised because although it was contended that the sale had been made in New York, the delivery of the goods, or the completion of the sale took place in Vermont. The Eighth Amendment it was held did not apply to the States. Mr. Justice Field dissented most vigorously, denouncing the punishment as both unusual and cruel, and declaring that great wrongs had been inflicted upon the defendant under the forms of law. If the sales were com-

¹ 144 U. S. 677 (1891).

² 144 U. S. 323 (1891).

pleted transactions in New York, passing the title to the goods, and leaving their transportation to Vermont as a matter for the direction of the purchaser, then Vermont assumed to punish an extra territorial offence. If they were but inchoate in New York, and consummated by delivery in Vermont, then were the acts of selling extra territorial, and the delivery was by inter State transportation. In this dissent Justices Harlan and Brewer concurred.

On the 22d of January, 1892, after more than twenty-one years of judicial service, Mr. Justice Bradley died, leaving a reputation for learning and ability which is one of the precious possessions of the Court. After the most searching inquiry and attentive consideration, President Harrison sent to the Senate, on the 19th of July, the name of George Shiras, Jr., as Mr. Bradley's successor, and notwithstanding strenuous efforts to prevent his confirmation by those who prefer politicians to jurists as judicial appointees, the Judiciary Committee reported his name within a week, and he was immediately confirmed. He is the fifth representative of Pennsylvania in the most august of our tribunals, his predecessors being Justices James Wilson, Henry Baldwin, Robert C. Grier, and William Strong.

He was born in Pittsburgh, Allegheny County, Pennsylvania, on the 26th of January, 1832. His remote ancestors on his father's side were among those sturdy Scots who bled with Wallace and followed Bruce to victory, although in later years the family strayed to the more fertile fields south of the Tweed. His father's great-grandfather came to Mount Holly, New Jersey, in 1750, and his grandfather, who was born two years before the battle of Lexington, removed to Fort Pitt, at the junction of the Allegheny and Monongahela rivers about the year 1800, where, but forty years before, upon what was then the Western frontier, General Stanwix



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and Colonel Bouquet had built redoubts. There the father of the present Justice, who is still living in good physical and mental health, was born on the 31st of March, 1805. The grandmother of Mr. Justice Shiras belonged to the Perry family, which is of New England extraction, after which the town of Perry on the Monongahela river was called. The mother of George Shiras, Jr., a woman of great beauty and rare mental gifts, was the daughter of the Rev. Dr. Francis Herron, a native of Cumberland County, Pennsylvania, of Scotch-Irish origin, who was educated at Dickinson College with Chief Justice Taney and President Carnahan, of Princeton College, as classmates, and who is still remembered as one of the most eminent and learned of divines, as well as one of the noblest of men, who in 1809 became the founder and pastor of the First Presbyterian Church, of Pittsburgh, and graced the position for fifty years. The wife of Dr. Herron, the maternal grandmother of Mr. Shiras, was Elizabeth Blaine, also of Scotch-Irish descent, and was born in Carlisle, Penna., the daughter of Ephraim Blaine, one of whose sons was the father of James G. Blaine.

Inheriting the intellectual independence, the self-respect and courage of this sturdy ancestry, George Shiras, Jr., after an excellent preliminary schooling, was fitted for college at the Ohio University, at Athens, and was sent to Yale as a member of the famous class of 1853, graduating in that year with Wayne MacVeagh, Andrew D. White, and Senator Gibson, of Louisiana, as classmates, and with two of his present associates, Justices Brewer and Brown, as well as Chauncey M. Depew as fellow collegians.

He pursued a course of law studies for one year in the Yale Law School, and then returning home read law under the direction of the Hon. Hopewell Hepburn, being admitted

to the bar of Allegheny County, Pa., in 1856. Removing to Dubuque, Iowa, in the following year, he joined his brother, Oliver P. Shiras, who is now United States District Judge in that Circuit. In 1858 he returned to Pittsburgh, and entered into a law partnership with his preceptor and his son, which continued until the death of Judge Hepburn in 1862. Since then he has continued in the uninterrupted and active practice of the law, and although closely identified with the growth and development of his native City and an earnest member of the Republican Party, he has never participated actively in politics and has never held an office, except that of Presidential Elector in 1888.

No artifice or persuasion could ever induce him to cast his eyes on the glittering rewards for partisan service, nor tempt him to stoop to acts which might be construed, however vaguely, as solicitations of political favors. In the deadlock of 1882, during the joint session of both Houses of the Legislature of Pennsylvania, Mr. Shiras was nominated as a compromise candidate for United States Senator, without his knowledge, on a secret ballot by a majority of two votes. His failure to respond to a telegram, due to his abhorrence of office-seeking, cost him the place, and the next day the Hon. John I. Mitchell was chosen.

At the bar the career of Mr. Shiras was marked by remarkable success in the transaction of an extensive business. For many years he has tried the most important cases arising in Western Pennsylvania, involving vast interests in oil, and coal, and iron, as well as corporate enterprises, railroad extensions, and great commercial and banking transactions. As a lawyer he was both able and conscientious, courteous and dignified in manner, of abundant legal learning, extraordinary quickness of apprehension, great strength of memory and sa-

gacious judgment. Highly accomplished as a scholar, of wide and general knowledge and experience, he brought to the discussion of complicated facts well-trained powers of analysis, and in addressing a court he was always calm, clear, simple, and straightforward in argument, acting rather as an *amicus curiæ* than as an impassioned partisan. His unvarying courtesy, his self-possession, which is rarely disturbed, his willingness to listen and his power of attention, his forbearance, his gentleness, and the merciful character of his judgments, are admirable qualities for a judge in a court of last resort, and, although without previous judicial experience, the prediction is confidently made by those who warmly supported him for the place, that he will fully sustain the dignity and purity, as well as ability and learning of the bench.

His appointment was a distinct triumph for the bar. In his case, which was not one of judicial promotion, professional fitness and legal proficiency, unaided by the arts of the demagogue, have won the loftiest honor that can crown the exertions, or reward the ambition of the most zealous priest in the temple of Themis.

Even in his pleasures, the simplicity of the character of Mr. Shiras is revealed. For nearly forty years he and his father—happily spared to be his companion among the lakes and streams, and renowned for his skill as an angler—have turned from toil with zest to those “recreations of the Contemplative man” so charmingly portrayed by the Sempster of Fleet Street; together they have often proved the pleasures yielded by valleys, woods, and hills, and like true disciples of Isaack Walton well know that “if the angler take fysshe, surely thenne, is there noo man merier than he is in his spyryte.”

In 1857 Mr. Shiras married Miss Kennedy, daughter of

Robert T. Kennedy, a prominent manufacturer of Pittsburgh, a woman of the most amiable social qualities, and of the most engaging modesty. They have two children, both sons, inheriting their father's professional tastes, and engaged in the practice of the law at Pittsburgh. In the year 1883 his Alma Mater conferred upon him the degree of LL.D., his name having been suggested for that honor by his Class of 1853, without his knowledge.

CHAPTER XXI.

DEATH OF MR. JUSTICE LAMAR : APPOINTMENT OF HOWELL E. JACKSON : SKETCH OF MR. JUSTICE JACKSON : DEATH OF MR. JUSTICE BLATCHFORD : APPOINTMENT OF EDWARD D. WHITE : SKETCH OF MR. JUSTICE WHITE : DEATH OF MR. JUSTICE JACKSON : APPOINTMENT OF RUFUS W. PECKHAM : SKETCH OF MR. JUSTICE PECKHAM : RESIGNATION OF MR. JUSTICE FIELD : APPOINTMENT OF JOSEPH MCKENNA : SKETCH OF MR. JUSTICE MCKENNA : VARIETY AND SCOPE OF CASES CONSIDERED : CHINESE EXPULSION : EXTRADITION : BOUNDARIES OF STATES : PROPERTY RIGHTS : LAND GRANTS : EX-POST FACTO LAWS : CRIMINAL CASES : EMINENT DOMAIN : SUITS AGAINST A STATE : SUNDRY LAWS : CONSTITUTIONAL LAW : POLICE POWER OF THE STATES : INTERSTATE COMMERCE : TRUST COMBINATIONS : COMMON LAW OF THE UNITED STATES : INSURANCE : COMMERCIAL LAW : ADMIRALTY : THE DEBS' CASE : THE INCOME TAX CASES : THE SUCCESSION TAX : THE STATUS OF CUBA : THE INSULAR TARIFF CASES.

BEFORE considering the judicial labors of the Court during the past decade, it is purposed to notice the changes wrought in the *personnel* of the tribunal by death and resignation. In less than four years no fewer than five vacancies occurred, to be filled by men belonging to a new judicial era, whose associated labors mark a new epoch in the history of the Court.

The death of Mr. Justice Lamar was announced on the morning of January 24th, 1893. With him passed away not merely a lawyer and a judge, but a notable historical figure. His judicial services had been slight, and he had not been spared to give many years to the labors of the bench, but he had displayed in a field comparatively new undoubted intellectual power, and had brought to the discharge of duty an intimate and unusual knowledge of the workings of the govern-

ment obtained through practical experience as a legislator and a cabinet officer. On the 18th of February of the same year, a commission was delivered to Howell E. Jackson of Tennessee, who took the oath of office as an Associate Justice on the 4th of the following March. President Harrison, himself a most eminent lawyer, had been governed in his choice by a personal and professional knowledge of the attainments and judicial qualities of his appointee, and had, after a deep conviction of his fitness for the place, disregarded considerations of party—an unusual and highly creditable act by which a President of Republican faith placed upon the bench of the highest court of the nation a Southern Democrat. The President's selection was everywhere applauded by members of the bar of both parties. Ruddy, robust, and full of energy the new Justice gave promise of long years of useful and valuable service, a promise assured by the record of his labors in the court from which he had been promoted. The brightness of his day was soon clouded, for in little more than two years he succumbed to the insidious effects of incurable disease.

He was born at Paris, Tennessee, in 1832. His father, who was a physician, was a Virginian by birth, and his mother, Mary W. (née Hurt) also came from the same State. He displayed through life qualities inherited from both parents. To his father he owed his breadth of grasp and strong intelligence; to his mother his acuteness and delicacy of perception. His early education was received at Jackson. One who knew him well describes him as "a serious, studious, thoughtful, laborious youth, who toiled for what he got; appeared only what he was; never borrowed the results of other's work, and what he got came to him because it belonged to him." In 1850 he entered the University of Virginia, and in due time graduated with honor. The next year was spent in the office of his kinsman, the Hon. A. W. O.



Harold E. Jackson

Totten, an Associate Justice of the Supreme Court of Tennessee. He then entered and graduated from the Law Department of Cumberland University, and in 1856 was admitted to the bar of Jackson in his native State. Two years later he removed to Memphis, and remained there until the outbreak of the Civil War. He had been an earnest Whig, devoted to the Union and opposed to secession, but when his people chose the opposite side, he threw in his lot with them, and adhered with ardor to their cause. For some years he served as Receiver under the Confederate Sequestration Act, and in this way acquired a knowledge of accounts. His office, while one of great trust, left him much leisure for a profound and systematic study of the law. After peace had been restored he was associated in practice with Hon. B. M. Estes of Memphis, until 1874, when, removing to Jackson, he formed the partnership of Jackson and Campbell. His practice was varied, embracing office work of a delicate and responsible character, while his services were prized as a counsellor and as a chancery and Supreme Court lawyer. His success with juries was also great, and his triumphs were due to his ardor and earnestness. He was chosen as a member of the State Court of Referees, a provisional Supreme Court created to assist the regular court in disposing of the vast accumulation of cases occasioned by the Civil War. He served with distinction. Later he became a candidate on the "State credit" ticket for the State Senate, and although an advocate of high taxes he won in a close contest. From this position he advanced to a seat in the Senate of the United States, where his talents and knowledge as a Constitutional lawyer and his untiring labors attracted the attention of President Cleveland, who appointed him to the United States Circuit Bench in the Sixth Judicial District as the successor of Judge Baxter. It was in this field that his real ability became conspicuous. His juris-

diction extended over four States reaching from Lake Superior to the Appalachian range, like a cross section of the Republic, presenting many varieties of population, business and laws. He was a just, upright, temperate judge, courteous, dignified and firm. He displayed great power of concentration and concise statement, business methods, skill in accounts, readiness in grasping mechanical principles and applying them in patent cases, an equal ease in dealing with questions of interstate commerce, commercial law, national banking, and crimes against the Federal Government. He was a man of clean, precise, practical business ways, of great self containment, of broad and kindly philosophy, but stern and fearless in the discharge of duty.

He was twice married, his last wife being the daughter of General Harding, who was interested in the breeding of fine horses. His home life introduced a tint of color most unusual in the career of judges, for he could be found, when unbending from judicial cares, dwelling at West Mead, a fertile farm of three thousand acres, with well watered meadows encircled by high hills, and covered with herds of well bred stock, or hunting the red fox behind a pack of hounds, with a wholesome human capacity for innocent enjoyment. He had scarcely taken his seat upon the highest bench before another chair stood vacant.

It was but a few weeks after the passing of Mr. Justice Lamar that death claimed Mr. Justice Blatchford. His judicial career had extended over twenty-six years. As District Judge he had given shape and form to the law of bankruptcy and admiralty. As Circuit Judge he had developed and extended the law of patents by patient research and faithful exposition. On the bench of the Supreme Court of the United States he had concentrated all his great energies upon his judicial duties,



G. D. White

and in an orderly, prosperous, and placid career, by safe and sagacious judgments, had settled large questions with breadth and luminousness of treatment.

After two unsuccessful efforts, extending over six weeks, to fill the place by nominees from the State of New York, which for eighty-eight years had had a representative in the highest court of the nation, President Cleveland turned abruptly to the State of Louisiana and to the Senate of the United States, and selected Edward Douglass White, who was confirmed without an hour's hesitation, and without reference to committee, all criticism of the selection of a Southern man for what had been exclusively a Northern circuit being stifled by the acknowledged ability and commanding character of the appointee.

The new Justice sprang from distinguished parentage. His grandfather, James White, went from Tennessee to Louisiana before the Treaty of Cession, and when the Territory was transferred to the United States became the first parish judge of what was then known as the *Atta Kupas* region in Southwestern Louisiana. His grandmother was of the old Willcox family of Philadelphia, whose early members sleep in St. Mary's churchyard. His father, who bore the same name as the more illustrious son, was a native of Tennessee, who was educated at the University of Nashville and studied law, filling successively with marked ability the positions of Associate Judge in Louisiana, Congressman, and Governor of Louisiana. His mother, Catharine Sidney Lee Ringgold, was the sister of Captain Thomas Lee Ringgold of Maryland who died during the Seminole War in Florida, and was related also to the hero of Palo Alto who has been immortalized in the song of "Maryland, my Maryland."

Edward Douglass White was born November 3rd, 1845, on his father's plantation on the Bayou La Fourche in a parish of

the same name in Louisiana. He was educated at Mount St. Mary's, near Emmitsburg, Maryland, and afterwards at Jesuit College, New Orleans, and at Georgetown College in the District of Columbia. During the civil war he entered the Confederate Army, and while at home on a furlough, narrowly escaped capture. During the siege of Port Hudson he served on the staff of General Beale, and was taken by General Banks at the surrender of that place, on the 6th of July, 1863. After the war he entered the law office of Hon. Edward Bermudez, afterwards the distinguished Chief Justice of Louisiana, and was admitted to the Bar in December, 1868. In 1877 he was elected State Senator for a term of four years, and was a strong supporter of Governor Nichols, who, in 1876, appointed him Associate Justice of the Supreme Court of the State, where he remained until 1879, when the new Constitution vacated all State offices. In 1877 Judge White conducted the campaign which resulted in the re-election of Governor Nichols, and this, with his association with the reform element of the State Democracy brought him far to the front, resulting in his nomination in 1890 by legislative caucus to succeed James B. Eustis in the Senate of the United States. His opponents were Senator Eustis, ex-Senator B. F. Jonas and Representative N. C. Blanchard. The contest was closed by his election through the support of the followers of Jonas. In the Senate he greatly distinguished himself upon two notable occasions. His argument against the constitutionality of the Anti-Option law was regarded by the lawyers of that body to be the ablest that was presented on the subject; it is still remembered and spoken of as a decided proof of the extensive learning and great power of the man, qualities which no one familiar with his judicial decisions, particularly those in the Succession tax case, the Income Tax cases, and the Insular



T. B. F. Shaw

cases, can regard as other than unusual. During the struggle for the repeal of the Sherman Act, Senator White again distinguished himself by an able advocacy of the views known to have been entertained by President Cleveland. He brought to the bench of the Supreme Court, in a manner never rivalled by any predecessor, a profound knowledge of the Civil law—a system under which he had been born and bred. His commission as an Associate Justice was dated February 19, 1894, and his oath of service was taken in open court on the 12th of March.

The next vacancy that occurred was through the death of Mr. Justice Jackson on the 8th of August, 1895, after a term of service as brief as that of Robert Trimble of Kentucky. The sad ravages of disease had been apparent for months, and had disabled him in the performance of judicial duty, but during his fast closing days he exhibited calm heroism by reappearing in his place when the public interests required it in the Income Tax Cases. This pathetic incident was touchingly referred to by Mr. Chief Justice Fuller, when announcing his death, who declared that it was thoroughly characteristic. Devotion to duty had marked his course throughout, and he had found in its inspiration the strength to overcome the weakness of the outward man as weary and languid he appeared in his seat for the last time in obedience to the demand of public exigency.

The President's choice of a successor fell upon Rufus Wheeler Peckham, a member of the Court of Appeals of the State of New York, thus restoring to the Empire State her representation in the tribunal. His commission was dated December 9th, 1895, and he was duly sworn in open court on the 6th of January, 1896. He was born in the City of Albany and State of New York, on the eighth of November, 1838. His father, whose name he bore, was bred to the law in which pro-

fession he was highly successful. After serving as a Congressman he was elected a Justice of the Supreme Court, and in 1870 a Judge of the Court of Appeals. The son after receiving his education at the Albany Academy and in Philadelphia, trod closely in the footsteps of his distinguished father. He studied law in the office of his father, a partner of Lyman Tremain, then Attorney General, and himself subsequently became corporation counsel for Albany City. After succeeding to his father's practice he became in 1883, first a Justice of the Supreme Court, and then, by election in 1886, a Judge of the Court of Appeals. As Smith Thompson, Samuel Nelson, and Ward Hunt had done before him, he ascended from the bench of the highest Court in his State to the loftiest Federal tribunal. One who knew both father and son has remarked, that the younger Peckham was to a notable extent a physical replica of the father, and it was not long before every veteran lawyer recognized that he was an intellectual replica as well. His opinions had attracted much attention because of the thoroughness and clearness of his methods of treatment, several of them being marked by originality of conception, where the topic discussed was new, and others amounting to careful treatises upon the law. The learning displayed was abundant, and his style was characterized by much felicity of expression.

In October, 1897, Mr. Justice Field, aware that the duties of his office had become too arduous for his strength, transmitted his resignation to the President through the Chief Justice and Mr. Justice Brewer, to take effect on the first of the following December. President McKinley replied in terms of sensibility and appreciation of the fact that the retiring Justice had served for a term longer than that of any member of the Court since its creation, and, throughout a period of special importance in the history of the country, had been occupied with as grave ques-

tions as ever confronted the tribunal, all of which had been met with exceptional ability, fidelity, and distinction. Nor could the fact be overlooked that he had been commissioned by Abraham Lincoln, and, graciously spared by a kind Providence, had survived all the members of the court of his appointment.

In a letter addressed to his Brethren of the Bench, dated October 12th, 1897, the venerable jurist, in terms happily conceived, reviews in a most interesting manner his long judicial career, covering a period of more than forty years. In 1857 he had been elected a member of the Supreme Court of California, holding his place for five years, seven months and five days, during the latter part of the time being Chief Justice. On March 10th, 1863, he was commissioned by President Lincoln. Prior to his coming to the bench of the Supreme Court of the United States there had been no representative in that tribunal of the Pacific Coast. A new Empire had arisen in the West, whose laws were those of another country, whose land titles were those of Spanish and Mexican grants, overlaid by the claims of first settlers. To bring order out of this confusion Congress had passed an Act providing for another seat on the bench to be filled by some one familiar with the conflicting titles, and with the mining laws of the Coast, of which Judge Field had been the principal framer. He was unanimously confirmed, the Senators from California and Oregon uniting to that end. His oath of office was delayed until the 20th of May following the commission, so that he might be sworn on the eighty-second birthday of his father who indulged just pride at his son's accession to exalted position.

At the head of the Court at that time was the venerable Chief Justice Taney, and among the Associates was Mr. Justice Wayne who had sat with Chief Justice Marshall, so that the newly appointed member constituted a link between the past

and future, and as it were bound into unity nearly an entire century of the life of the Court. At the time of his resignation he had seen three Chief Justices and sixteen associates pass away. He came to the bench when the country was in the midst of war. Washington was then a great camp, and the boom of cannon could be heard on the other side of the Potomac. But the Court met in regular session, never once failing in time or place, as though there was no sound of battle. War added to the amount of litigation. Then came the period of Re-construction and the last Amendments to the Federal Constitution. In the effort to re-establish the nation and adjust all things to changed political and economic conditions, questions of far reaching importance were developed; questions of personal liberty, of constitutional right, which after heated discussion before the people and Congress were finally brought to the Court for settlement. No more difficult or momentous questions ever appeared. Judicial decisions supplanted angry debate, and the conclusions of the Court were accepted, not simply of necessity as so prescribed by the fundamental law, but in the main as in themselves both correct and wise. Then followed marvellous material development. Wealth such as had never been dreamed of accrued. Gigantic enterprises were undertaken and carried through. Transcontinental railroads were built; inventions multiplied. Out of this changed social and economic condition sprang an immense multitude of cases, and litigation of a character vitally affecting the future prosperity and safety of the country.

Mr. Justice Field wrote the opinion of the Supreme Court in six hundred and twenty cases, and delivered fifty-seven opinions upon circuit.

Although all of the decisions rendered during this troubled time have not met with the universal approval of the American

people, yet it is to the glory of that people that always and everywhere there had been yielded a willing obedience to them, a fact eloquent of the stability of popular institutions, and demonstrating that the people are capable of self government.

In closing his letter, the great jurist, who had passed thirty-four years and seven months in the service of the nation, uses these impressive words :

"As I look back over the more than a third of a century that I have sat upon this bench, I am more and more impressed with the immeasurable importance of this Court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most democratic of all. Senators represent their States, and Representatives their constituents, but this Court stands for the whole country, and as such it 'is truly of the people, by the people, and for the people.' It has indeed no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safe guard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours."

The Court was profoundly moved by this letter, and declared that the termination of a judicial career of such length and distinction could not fail to inspire among all his countrymen, and indeed throughout the wide realm of jurisprudence, a keen sense of loss, which to his colleagues assumed the aspect of a personal bereavement.

He died April 9th, 1899. His labors had left no region of the law unexplored, and now that he rested from them, his works did follow him.

The judicial mantle fell upon the shoulders of Joseph McKenna as the successor of Mr. Justice Field. His commission was dated January 21, 1898, and on the 26th of the same month he was sworn in open court, and at once took his seat upon the bench. He was born of parents of Irish descent in the city of Philadelphia, August 10, 1843, where he attended St. Joseph's College. In 1855, his parents removed to Benicia, California, and the future Associate Justice attended both the public school and the collegiate institute at his new home. Originally intended for the priesthood, he turned to the law, and after proper instruction was admitted to the Bar in 1865. He had been a member of the profession but five years, when his talents and energy led to his election as District Attorney of the county of Solona, and such was the public satisfaction with his course that he was re-elected. "I tried to vindicate such learning as I had," he once wittily remarked to a friend, "because my county of Solona bore the revered name of Solon, the law giver, who ameliorated the harsh statutes of Draco." As he became more experienced at the bar, his practice grew until he commanded the leading business in Suisin, the county town, where his office adjoined the Court-house, and attracted those in search of that judicious advice or determined action which resulted in the righting of wrongs. In his thirty-second year he became a member of the State legislature. He was twice nominated for Congress, without success, but, fighting with determination, maintained his leadership and was elected after a third nomination, and served for three successive terms. It was during this stage of his career that he won the friendship and esteem of William McKinley, then a member of the House, an attachment which was close and personal, and led to his elevation to still more exalted positions. Upon the death of the Hon. Lorenzo Sawyer, he was appointed by President Harrison



Joseph McKenna

Circuit Court Judge in the Ninth Judicial District, and served for five years, his opinions meeting with general approval for their strong good sense and clearness of statement. It was from this post that he was summoned by President McKinley to assume the duties of a Cabinet officer as Attorney General of the United States. In but little more than nine months he was placed upon the bench of the Supreme Court of the United States as the second representative in that tribunal of the Pacific coast

The questions considered by the Court during the past ten years are almost infinite in their variety. Perhaps it is not too much to say that no period of similar duration, during the entire history of the tribunal, has produced so many cases likely to affect the future welfare and growth of the nation.

In the case of *Fong Yue Ting v. United States*,¹ notwithstanding the vigorous dissent of Justices Field and Brewer, who pointed out that there was a wide and essential difference between legislation for the exclusion of Chinese persons—that is to prevent them from entering the country—and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, the Court reached the conclusion that Chinese laborers, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility, but continue to be aliens, having taken no steps towards becoming citizens, and being incapable of becoming such under the naturalization laws, and remain subject to the power of Congress to expel them, or to order them to be removed

¹ 149 U. S. 698.

and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

This conclusion was enforced and strengthened by the case of *Wong Wing v. United States*,¹ to the effect that detention or temporary confinement might be resorted to as part of the means necessary to give vigor to the exclusion or expulsion of the Chinese. The United States could forbid aliens from coming within their borders, and expel them from their territory, and could devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials; but when Congress saw fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, it was necessary to the validity of such legislation to provide for a judicial trial to establish the guilt of the accused.

These conclusions were somewhat tempered by the doctrine announced in *United States v. Wong Kim Ark*,² that a child born in the United States of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had a permanent domicile and residence in the United States, and were there carrying on business, and were not employed in any diplomatic or official capacity under the Emperor of China, became at the time of his birth a citizen of the United States, within the meaning of the Fourteenth Amendment of the Constitution, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In the case of *Ornelas v. Ruiz*³ an interesting question of extradition arose. A body of bandits, without uniforms or flag, but with a red band on their hats, had passed over the Rio

¹ 163 U. S. 228.

² 169 U. S. 649.

³ 161 U. S. 503 (A. D. 1895).

Grande from Texas into Mexico, and attacked about forty Mexican soldiers, killing and wounding some of them, burning their barracks, and depriving them of their horses and equipments, violently assaulting private citizens, extracting money from women, and kidnapping several citizens who were carried over the river to the Texas side. There was evidence that there had been a revolutionary movement on the border the previous year, and that the aim and purpose of the movement was to cross the river and fight against the Mexican government. Complaint was made by the Mexican consul. Several of the participants, who had been identified, were charged with murder, arson, robbery and kidnapping. It was alleged that they were fugitives from justice, and had fled into the jurisdiction of the United States in search of an asylum. The crimes alleged were enumerated and embraced in the treaty of Extradition then in force between the United States and the Republic of Mexico. The Commissioner of the Circuit Court of the United States for the Western District of Texas issued warrants for their arrest, and found the evidence sufficient to warrant their commitment for extradition. On the application of the prisoners the United States District Judge allowed writs of *habeas corpus*, and, upon hearing, decided that the offences charged were political offences, not extraditable, and ordered the prisoners discharged. An appeal was taken to the Supreme Court of the United States. It was held that as the construction of the treaty was drawn in question, the case was properly brought to the Court, but that as a writ of *habeas corpus* could not perform the office of a writ of error, the decision of the magistrate could not be reviewed. The case was remanded for further proceedings in conformity to law.

In *United States v. Texas*¹ the Court had occasion to

¹ 162 U. S. 1 (A. D. 1896).

consider the boundary lines of the State of Texas, and held that where the treaty referred to a map, known as Mellish's Map of the United States, published at Philadelphia, improved to the first of January, 1818, the intentions of the two governments, as gathered from the treaty, must control, and that the map to which the contracting parties had referred must be given the same effect as if it had been expressly made a part of the treaty.

The boundary lines between Iowa and Illinois were settled in a case between those States¹ in an interesting opinion by Mr. Justice Field, who held, after a careful review of the doctrines of international law, that the true line in a navigable river between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. This rule preserved to each State equality in the right of navigation in the river. Thus the jurisdiction of each State extended to the thread of the stream, that is to the "mid-channel," and if there were several channels, to the middle of the principal one, or, rather, the one usually followed.

Disputed claims to properties of incalculable value, to water fronts, waterways, oyster beds, mineral lands, and railroad grants were settled in a series of interesting cases which display great historical research and knowledge as well as skilful applications of the principles of law in adjusting conflicting rights.

In *Illinois Central Railroad v. Illinois*² the object of the litigation was to determine the rights, respectively, of the State, of the City of Chicago, and of the railroad company in land submerged or reclaimed in front of the water line of the city on Lake Michigan. It was declared that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States belong to the respective States within which they were found, with the consequent right to

¹ 147 U. S. 1 (A. D. 1892).

² 146 U. S. 387 (A. D. 1892).

use or dispose of any portion thereof, but subject to the interest of the public in the waters, and subject also to the right of Congress, which was paramount, to control their navigation for the regulation of foreign and interstate commerce. The same doctrine applied to lands under the navigable waters of the Great Lakes. The rule to be followed was that of the common law as to dominion over lands overflowed by the tides of the sea. The rights of the United States in the Lake Front were considered in the later case of *United States v. Illinois Central Railroad Company*.¹

The early colonial rights granted to a town, in the State of New York, by the Governor General under the Duke of York, in 1666, and confirmed by Governor Dongan in 1688, and again confirmed, with a change in description, by Governor General Fletcher in 1694, were discussed and defined by Mr. Justice Brewer, in the case of *Lowndes v. Huntington*.² The compact between the States of Virginia and Maryland, in 1785, was reviewed in *Wharton v. Wise*,³ and it was also held that as that compact contained no reference to fish of any kind in Pocomoke River or Pocomoke Sound, and no clause in that compact gave Maryland a right to fish in those waters, the State of Virginia was not inhibited from trying and convicting citizens of Maryland for offences committed in Virginia against her laws regulating the oyster fisheries. So too, in *Shively v. Bowlby*,⁴ the title to the lands below high water mark, in Oregon, near the Columbia river, was finally determined, while in the *United States v. Northern Pacific Railroad Company*⁵ a Congressional grant in aid of the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast by the Northern route was finally expounded. The Land Grant to the Northern Pacific Railroad Company⁶ was considered at or

¹ 154 U. S. 225 (A. D. 1893).

² 153 U. S. 1 (A. D. 1893).

³ 153 U. S. 155 (A. D. 1893).

⁴ 152 U. S. 1 (A. D. 1893).

⁵ 152 U. S. 284 (A. D. 1893).

⁶ 154 U. S. 288 (A. D. 1893).

about the same time ; it was held that all mineral lands other than iron or coal, whether known or unknown, not otherwise specifically provided for in the grant, were reserved exclusively to the United States, the company having the right to select unoccupied or unappropriated agricultural lands in odd sections, nearest to the line of the road, in place thereof.

Some instructive discussions of Constitutional principles touching *ex post facto* laws, due process of law, and the Fourteenth Amendment are found in the cases of *Duncan v. Missouri*,¹ *Gibson v. Mississippi*,² *Thompson v. Utah*,³ and *Thompson v. Missouri*.⁴ In the first of these Mr. Chief Justice Fuller declared that, generally speaking, an *ex post facto* law was one which imposed punishment for an act which was not punishable at the time it was committed ; or an additional punishment to that then prescribed ; or which changed the rules of evidence by which less or different testimony was sufficient to convict than was then required ; or, in short, in relation to the offence or its consequences, which altered the situation of a party to his disadvantage ; but the prescribing of different modes of procedure, or the abolition of courts and the creation of new ones, leaving untouched all the substantial protection with which the existing law surrounded the person accused of crime, was not considered within the Constitutional inhibition.

The second case declared that the inhibition upon *ex post facto* laws did not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial was always under legislative control, subject only to the condition that the Legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate accepted principles that protect the accused against *ex post facto* enactments. The third case

¹ 152 U. S. 377 (A. D. 1893).

² 162 U. S. 565 (A. D. 1895).

³ 170 U. S. 343 (A. D. 1897).

⁴ 171 U. S. 380 (A. D. 1897).

denounced as *ex post facto* a provision in the Constitution of Utah, which provided for the trial of criminal cases, not capital, by a jury of eight persons, when it was attempted to be applied to felonies committed before the Territory became a State. The fourth case upheld a State Act providing that "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," when applied to prosecutions for crimes committed prior to its passage. The statute was a mere regulation of procedure, and did not impair the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land.

In *Sparf and Hansen v. United States*¹ there is to be found the most thorough and exhaustive discussion of two topics of profound interest to the criminal bar—the admissibility of voluntary confessions made by accused prisoners, in custody and in irons, and the right of juries to disregard the law as laid down in the instructions of the Court. The dissenting opinion of Mr. Justice Gray, concurred in by Mr. Justice Shiras, is a mine of information in relation to the second topic, and leaves nothing to be added by way of illustration or authority. The controversy is as old in England as Mr. Erskine's celebrated argument before Lord Mansfield in support of a motion for a new trial in the Dean of St. Asaph's case, but American jurists will recall with pride that fifty years before Mr. Erskine's voice was raised in Westminster Hall it was Andrew Hamilton of Philadelphia, then in his seventieth year, who vindicated in triumph at Albany, in the trial of John Peter Zenger, indicted for a

¹ 156 U. S. 51 (A. D. 1894).

sedition libel upon the government, the principles afterwards embodied in the famous libel law of Charles James Fox.

In close relation to the subject matter of the foregoing case are those of *Hallinger v. Davis*,¹ and *Lewis v. United States*,² in both of which Mr. Justice Shiras delivered the opinion. In the former, it was held that a State Statute, conferring upon one charged with crime the right to waive a trial by jury, and to elect to be tried by the court, and conferring power upon the court to try the accused in such a case, was not in violation of the Constitution. In the latter it was ruled that in trials for felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. The constitutional right of a defendant to be informed of the nature and cause of the accusation against him was dwelt on in *Rosen v. United States*, while the admissibility of decoy letters was sustained in several cases.⁴

Norwood v. Baker,⁵ *French v. Barber Asphalt Paving Company*,⁶ and *Wright v. Davidson*,⁷ constitute an interesting group of cases in which the relation of the Fifth and Fourteenth Amendments of the Constitution to the taking of private property for public use, under the systems of the States pertaining to general and special taxation, is considered. The discussions are luminous, and state with admirable precision the extent of private rights and the measure of public power. It was concluded that by general judicial agreement it had become settled law that the authority to require property specially benefited by a public improvement to bear the expense of

¹ 146 U. S. 314 (A. D. 1892).

² 146 U. S. 370 (A. D. 1892).

³ 161 U. S. 29 (A. D. 1895).

⁴ *Grimm v. U. S.*, 156 U. S. 604 (A. D. 1894); *Hall v. U. S.*, 168 U. S. 632; *Soode v. U. S.*, 159 U. S. 663 (A. D. 1895); *Montgomery v. U. S.*, 162 U. S. 410 (A. D. 1895).

⁵ 172 U. S. 269 (A. D. 1898).

⁶ 181 U. S. 324 (A. D. 1900).

⁷ 181 U. S. 371 (A. D. 1900).

such improvement was a branch of the taxing power of the States, or at least included within it. It was purely a question of legislative expediency whether the expense of making such improvements should be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment should be upon all property found to be benefited, or alone upon the abutments according to frontage or according to the area of their lots.

The converse of the proposition, through the infliction of damages resulting from a taking, and the inability of those in the vicinity of the property so taken to recover consequential damages, is discussed in *Morehart v. Pennsylvania Railroad*.¹ It was held that the construction of an elevated railroad, under the laws of a State, on private land abutting on a public street in a city, gave to the owner of land on the opposite side of the street no claim to recover consequential damages for injuries alleged to be inflicted upon him. The estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required by the Constitution of the United States to be made by a jury, but may be entrusted to commissioners appointed by a court, or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. Such is the doctrine of *Bauman v. Ross*.²

The oft mooted question as to what constitutes a suit against a State within the meaning of the Eleventh Amendment arose in *Reagan v. Farmers' Loan and Trust Company*,³ and *Tindal v. Wesley*.⁴ After a review of former decisions, it was again announced, on the authority of *United States v. Lee*,⁵ that a suit against individuals to recover the possession of property was not a suit against the State simply because

¹ 153 U. S. 380 (A. D. 1893).

² 154 U. S. 362 (A. D. 1893).

³ 167 U. S. 548 (A. D. 1896).

⁴ 167 U. S. 204 (A. D. 1896).

⁵ 106 U. S. 196 (A. D. 1882).

the defendant holding possession happened to be an officer of the State and asserted that he was lawfully in possession in its behalf. The Eleventh Amendment gave no immunity to officers or agents of a State in withholding property of a citizen without authority of law ; and when such officers or agents asserted that they were in rightful possession, they must make that assertion good, upon its appearing, in a suit against them as individuals, that the legal title and right of possession were in the plaintiff. The State was not concluded unless it became a party to the suit.

Turning from questions such as these we find the Court considering the Sunday laws of the States, of which we select as instances *Hennington v. Georgia*¹ and *Petit v. Minnesota*.² In the former the State had forbidden the running of freight trains on the Sabbath Day, and the defendant, a superintendent of transportation, had violated the law. It was held that though the law affected interstate commerce in a limited degree, yet it was not, for that reason, a needless intrusion upon Federal legislative domain, nor was it strictly a regulation of interstate commerce. It was but an ordinary police regulation, designed to serve the well being, and to promote the general welfare of the people within the State, by prescribing a rule of civil duty for all who, on the Sabbath Day, were within the territorial jurisdiction of the State. Such a law was to be respected by the Courts of the Union until superseded and displaced by some Act of Congress, passed in execution of the power granted to it by the Constitution. In the latter case, the Court held that the Legislature of Minnesota had not exceeded the limits of the police power in declaring that, as a matter of law, keeping barber shops open on Sunday was not a work of necessity or charity, while, as to all other kinds of labor, they

¹ 163 U. S. 299 (A. D. 1895).

² 177 U. S. 164 (A. D. 1899).

had left that question to be determined as a question of fact. The State necessarily had a wide discretion, and the classification of work or labor was not so palpably arbitrary as to bring the law into conflict with the Federal Constitution.

The nature of the police powers of the States was further considered in *Plumley v. Massachusetts*,¹ the State having undertaken to forbid the manufacture and sale of oleomargarine. Although in the dissenting opinion of Mr. Chief Justice Fuller, concurred in by Justices Field and Brewer, the case involved a serious circumscription of the realm of trade, and destroyed the rule as to the freedom of interstate commerce by an unnecessary exception, it was held by the majority of the Court, speaking through Mr. Justice Harlan, that the judiciary of the United States should not strike down a legislative enactment of a State—especially if it had a direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violated some right granted or secured by the national Constitution, or encroached upon the authority delegated to the United States for the attainment of objects of national concern.

Another phase of the same question arose in *Austin v. Tennessee*,² the majority of the Court holding that while they were not disposed to question the general principle that the States could not under the guise of inspection or revenue laws forbid or impede the introduction of products universally recognized to be harmless, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, yet if the action of the State legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indi-

¹ 155 U. S. 461 (A. D. 1894).

² 179 U. S. 343 (A. D. 1900).

rectly with interstate commerce. From the application of these principles to a case involving the sale of cigarettes in packages of a character clearly intended to evade the State law, there was a strong dissent by Mr. Justice Brewer, concurred in by the Chief Justice and Justices Shiras and Peckham. In their view the matter was one for Congressional and not for State action. The power could not be conceded to a State to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without Congressional permission.

The Court had occasion still further to examine the police powers of the States, and the extent to which they were controlled by the Fourteenth Amendment in the case of *Holden v. Handy*¹. The legislature of Utah had undertaken to regulate the laws of employment in underground mines and in smelters and ore reduction works. Apart from the general authority, existing under the Constitution of the United States, possessed by a State to adopt means for the protection of the lives and health of its citizens, the State Supreme Court had relied upon a special provision in the State Constitution declaring that the legislature should pass laws to provide for the health and safety of employ  s in factories, smelters and mines, intended to guard the rights of labor. This was assailed as a piece of class legislation, interfering with the freedom of contract, and abridging the privileges and immunities of citizens of the United States. These contentions were fully met in an elaborate and complete review of the precedents by Mr. Justice Brown, in which the course of legal reform as expressed in statutes mitigating many of the rigors of ancient times was most instructively stated, and it was shown that the rights of contract were properly subject to certain limitations which a State might lawfully impose for

¹ 169 U. S. 366 (A. D. 1897).

the protection of health and morals. No criticism was attempted or intended of the many authorities holding that State statutes restricting the hours of labor were unconstitutional, but these cases had no application where the legislature in the exercise of a reasonable discretion had determined that a limitation was necessary for the preservation of the health of employés, and there were reasonable grounds for believing that such determination was supported by the facts.¹

The infinite diversity of topics which taxed the energies and effectively displayed the varied learning of the Court is illustrated in a multitude of instances of which but a few can be selected.

In *Meehan v. Valentine*² the requisites of a true partnership are discussed; in *May v. May*³ there is considered the power of a court of equity to remove a trustee, and to substitute another in his place, in the discharge of its paramount duty to see that trusts are properly executed; in *Ankeney v. Hannon*⁴ there is a concise but complete review of the law relating to married women; in *Lake Shore and Michigan Southern Railway Company v. Prentice*⁵ the liability of a railroad company to exemplary or punitive damages for an illegal and wanton arrest of a passenger by a conductor of one of its trains is denied, when it was not shown that the company had authorized or ratified the act; in *Hilton v. Guyet*⁶ the character and conclusiveness of a foreign judgment, sought to be enforced in a court of this country, is fully stated in an opinion which exhausts the learning of jurisprudence and the principles of international law; in *Connecticut Mutual Life Insurance Company v. Akens*,⁷ and *Ritter v. Mutual Insurance Company*

¹ Compare *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703, with *Vick Wo v. Hopkins*, 118 U. S. 356.

² 145 U. S. 611 (A. D. 1891).

³ 167 U. S. 310 (A. D. 1896).

⁴ 147 U. S. 118 (A. D. 1892).

⁵ 147 U. S. 101 (A. D. 1892).

⁶ 156 U. S. 113 (A. D. 1894).

⁷ 150 U. S. 468 (A. D. 1893).

of New York¹ the insanity of a suicide, upon whose life there were policies of life insurance upon which recovery was sought, is weighed as a defence; in *Campania la Flecha v. Frauer*² the responsibilities of carriers of cattle at sea are defined; in *Roehm v. Horst*³ the famous rule is at last adopted as a part of the jurisprudence of the United States that, after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damages he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of the option.

The case known as *In re Debs*, Petitioner,⁴ presents an interesting instance, already historic, of interposition by bill in equity for an injunction, filed by the United States, to prevent the forcible obstruction by striking laborers of interstate transportation of persons and property, as well as the carriage of the mails. The purpose of the bill was to restrain forcible obstruction of the highways along which interstate commerce traveled and the mails were carried. It did not seek to challenge the right of any laborer, or any number of laborers to quit work, nor was it a bill to command a keeping of the peace. Its effect was immediate. As soon as the strikers found that their leaders were arrested and taken from the scene of action, they became demoralized, and that ended the strike. In the words of one of their number: "The men went back to work, and the ranks were broken, and the strike was broken up, not by the army, and not by any other power, but simply and solely by the action of the United States Courts in restraining us from discharging

¹ 169 U. S. 139 (A. D. 1897).

² 168 U. S. 104 (A. D. 1897).

³ 178 U. S. 1 (A. D. 1899).

⁴ 158 U. S. 564 (A. D. 1894).

our duties as officers and representatives of our employés." It was a praiseworthy rather than a blameable act, in the opinion of the court, that the government instead of determining for itself questions of right and wrong, and enforcing that determination by the club of the policeman and the bayonet of the soldier, submitted all questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. It was equally to the credit of the latter that the judgment of those tribunals was respected, and the troubles which threatened so much disaster were terminated.

In a most carefully considered opinion, delivered by Mr. Justice Brewer, the Court announced as its conclusions: That the government of the United States had jurisdiction over every inch of soil within its territory and, acted directly upon each citizen; while the government was one of enumerated powers, it had within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mails; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that it was competent to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times, and by indubit-

able authority ; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by acts in themselves violations of the criminal law ; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt ; that such proceedings are not in execution of the criminal laws of the land ; that the penalty for a violation or injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation.

No more signal instance can be found in all the books of the peaceful triumphs of the law. However much government by injunction may be denounced upon the hustings, the contribution of jurisprudence made in this case to the cause of peace will remain as one of the most splendid as well as lasting fruits of government by law and according to law, resulting in the full and ample protection of freedom of commerce, the safety of life and limb, and the preservation of property. Nor does it supplant or subvert the right of trial by jury. No student of equity jurisprudence, even though he be also a practitioner in the criminal courts, can in candor deny the soundness of the distinctions drawn between the various remedies which may be resorted to in times of violence and destructive riot.

The October term of 1894 was signalized by the argument and decision and rehearing, and second decision of a case—*Pollock v. Farmers' Loan and Trust Company*¹—which will affect for all time to come the conduct and welfare of the country. The case is popularly known as the *Income Tax Case*. The counsel in the cause, several of them the acknowledged veteran leaders of their day, who had often borne the brunt of mighty forensic contests in which the issues were national in importance, were duly impressed by the gravity of the matter. One of them solemnly

¹ 157 U. S. 429 (A. D. 1894).

declared : "I have felt the responsibility of this case as I have never felt one before and never expect to again. I do not believe that any member of this court ever has sat or ever will sit to hear and decide a case the consequences of which will be so far reaching as this. * * * 'No mortal could rise above the height of this great argument.' " His opponent, after alluding to the case as one calculated to arouse the interests, the feelings—almost the passions—of the people, said that "nothing would be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a law suit." The colleague of the former described the Act of Congress animadverted upon as "one of the plants of vice that bloom in the tax garden of injustice," and denounced it as a tyrannical and unconstitutional attempt on the part of a governmental inquisition to invade the private affairs of citizens ; while the Attorney General, on the other hand, suggested that the formidable and erudite demonstration against the law, in its essence and in its last analysis, was nothing but "a call upon the judicial department of the government to supplant the political in the exercise of the taxing power ; to substitute its discretion for that of Congress in respect of the subjects of taxation, the plan of taxation, and all the distinctions and discriminations by which taxation is sought to be equitably adjusted to the resources and capacities of the different classes of society."

The case was this. An act had been passed by Congress to reduce taxation, to provide revenue for the government, and for other purposes, by providing that there should be assessed, levied, and collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, whether said gains, profits, or income be derived from any kind

of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars ; and a like tax was to be levied, collected and paid annually upon the gains, profits and income from all property owned and of every business, trade or profession carried on in the United States by persons residing without the United States. The Act exempted charitable, religious, and educational institutions, and also building and loan associations, savings banks, and mutual insurance companies.

A bill was filed by a citizen of Massachusetts, a stockholder in the Farmer's Loan and Trust Company, which was a New York corporation, to restrain the directors of the company from making and filing with the collector of internal revenue a list, return, or statement showing the amount of the net income of the company, and a similar return of the incomes of those for whom the company was acting in a fiduciary capacity.

Three specific objections were urged against the law ; first, that the income tax was a direct tax, and therefore an infraction of the constitutional requirement that such taxes should be apportioned among the States according to population ; second, that if it is not a direct tax, it must be a duty, impost, or excise, and then invalid, because not uniform throughout the United States ; third, that it applied to particular descriptions of property, such as State and municipal bonds, which were subjects withdrawn from the jurisdiction of the Federal government.

It was answered that as to whether it was a direct tax or not, the question was not open to debate. It had been put at rest by solemn judicial decisions, acquiesced in and undisturbed for a long series of years, and should be regarded as beyond the reach of further agitation. As to the second point, the

uniformity required was geographical in character, and meant simply that the tax must be the same in each State as it is in every other State; and as to the third, while it had been settled that the bonds of one State or its municipalities might be taxed by another State, it had never been settled that they could not be taxed by the Federal government. It could not be said that the United States did not have the power of taxing a species of property which every State in the Union had the power of taxing.

The opinion of the Court was delivered by Mr. Chief Justice Fuller. After glancing at the jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits, a point which was not elaborated, because the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument, he stated the points of contention to be: First, that the law in question, in imposing a tax on the income or rents of real estate, imposes a tax on the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property held for the purposes of income as ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void, because imposed without regard to the rule of apportionment, and that by reason thereof the whole law is invalidated. Second, that the law is invalid, because imposing indirect taxes in violation of the constitutional requirement of uniformity; and therein also in violation of the implied limitation upon taxation that all tax laws must apply equally, impartially, and uniformly to all similarly situated. Third, that the law is invalid so far as imposing a tax upon income received from State and municipal bonds.

After an elaborate review of the history of taxation as

known and understood by American statesmen from the earliest days, and a particular account of the tax clause in the Constitution as displayed in the debates and published opinions of the Framers, the Chief Justice passed in review the previous decisions of the Supreme Court from *Hylton v. United States*¹ to *Springer v. United States*,² and while conceding the doctrine of *stare decisis* a salutary one, to be adhered to on proper occasions, in respect of decisions directly upon points in issue, yet he declined to hold the court bound to extend the scope of decisions—none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only—so as to sustain a tax on the income of realty on the ground of being an excise or duty. The Court could not perceive any ground for the alleged distinction between a direct tax on land, and a tax on the rent or income issuing out of land. According to feudal law rents or profits or income from land amount to the land itself, “for what is land,” asked Coke, “but the profits thereof”? Substantially for the same reason a tax on the income of securities was a tax on the securities themselves. So much being established, the conclusion followed that the law violated the rule of apportionment. So too a tax on the income of State and municipal securities was in effect a tax by the United States on the power of the States to borrow, and consequently repugnant to the Constitution. As the Justices who heard the argument, Mr. Justice Jackson being absent, were equally divided upon the points, 1, whether the void provisions as to rents and income from real estate invalidated the whole act? 2, whether as to the income from personal property as such, the act was unconstitutional as laying direct taxes? 3, whether any part of the tax, if not

¹ 3 Dallas, 171.

² 102 U. S. 506.

considered as a direct tax, is invalid for want of uniformity, no opinion was expressed.

Mr. Justice Field filed a concurring opinion, marked by great vigor of expression and depth of feeling. In his view the whole law should be declared void, and without any binding force—that part which related to the tax on the rents, profits or income from real estate, that is, so much as constituted part of the direct tax, because, not imposed by the rule of apportionment according to the representations of the States, as prescribed by the Constitution—and that part which imposed a tax upon the bonds and securities of the several States, and upon the bonds and securities of their municipal bodies, and upon the salaries of the judges of the courts of the United States, as being beyond the power of Congress; and that part which laid duties, imposts, and excises, as void in not providing for the uniformity required by the Constitution in such cases.

Mr. Justice White dissented in an opinion which is fit to rank with the great dissenting opinions of former days. Mr. Justice Harlan concurred. A powerful objection was taken *in limine*, that the decision of the court allowed, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States, even though the court had denied the existence of such a remedy in the case of a tax levied by a State. In his view the opinion of the Court overthrew in result a long and consistent line of decisions, and denied to the legislative department of the Government the possession of a power conceded to it by universal consensus for one hundred years, and which had been recognized by repeated adjudications of the Court. The opinions and decree in the case virtually annulled its previous decisions in regard to the powers of Congress on the subject of taxation, and was therefore fraught with danger to the Court, to each and every citizen, and to the Republic. To

him it seemed that the accomplishment of the lofty mission of the Court could only be secured by the stability of its teachings and the sanctity which surrounded them. If the belief in judicial continuity were broken down, and it was felt that on great constitutional questions the Court was to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily filled its bench, the Constitution would be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.

Within a week after the decision had been announced an application was made by the appellants, substantially concurred in by the Government, for a rehearing upon the propositions as to which the Court was equally divided. Mr. Justice Jackson resumed his seat, and the argument came on before the full bench. A large mass of additional historical evidence relating to taxation in the colonies was adduced, and the Court, through the Chief Justice, declared that it had been shown that *Hylton v. United States* only decided that the tax therein considered was an excise, and was therefore an indirect tax. In the distribution of the power to tax under the Constitution the States retained the absolute power of direct taxation, but there was granted to the Federal Government the power of the same taxation upon the distinct condition that, in its exercise, such taxes should be apportioned among the several States according to numbers. It was held that taxes on the rents or income of real estate were direct taxes, and the same was true of taxes upon the income of personal property. The former conclusions of the Court remained unchanged, but their scope was enlarged by the acceptance of their logical consequences. The scheme was to be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a

direction which could not have been contemplated except in connection with the taxation considered as an entirety, the Court was constrained to declare the law to be invalid.

Separate dissenting opinions were filed by Justices Harlan, Brown, Jackson and White. The reasoning of the majority opinion was contested step by step, its criticisms of former decisions criticised, its deductions challenged, and their soundness and wisdom denied. Mr. Justice Harlan did not think it possible for the Court to have rendered any judgment more to be regretted. It struck at the very foundations of national authority, in that it denied to the general Government a power which was, or might become, vital to the very existence and preservation of the Union in a national emergency. It tended to re-establish that condition of helplessness in which Congress found itself during the period of the Articles of Confederation, when it was without authority by laws operating directly upon individuals, to lay and collect, through its own agents, taxes sufficient to pay the debts and defray the expenses of the Government, but was dependent, in all such matters, upon the good will of the State, and their promptness in meeting requisitions made upon them by Congress. The decree dislocated—principally, for reasons of an economic nature—a sovereign power expressly granted to the general Government and long recognized and fully established by judicial decisions and legislative actions.

Mr. Justice Brown entertained similar views. The decision implied a declaration that every income tax must be laid according to the rule of apportionment, involving nothing less than a surrender of the taxing power to the moneyed class. Even the spectre of socialism had been conjured up to frighten Congress from laying taxes upon the people in proportion to their ability to pay them. It was certainly a strange commentary upon the Constitution of the United States and upon a demo-

cratic government that Congress had no power to lay a tax which is one of the main sources of revenue of nearly every civilized State. It was a confession of feebleness in which he found himself wholly unable to join.

The opinion of Mr. Justice Jackson is interesting because it was his last judicial utterance. It is clear, simple and strong. "Considered in all its bearings," he declared, "this decision is, in my judgment, the most disastrous blow ever struck at the Constitutional power of Congress."

Mr. Justice White submitted that it was greatly to be deplored that after more than one hundred years of our national existence, after the Government had withstood the strain of foreign wars and the dread ordeal of civil strife, and its people had become united and powerful, the highest court should consider itself compelled to go back to a long repudiated and rejected theory of the Constitution, by which the Government was deprived of an inherent attribute of its being, a necessary power of taxation.

In *Addystone Pipe and Steel Company v. United States*,¹ in an opinion delivered by Mr. Justice Peckham, the Court dealt with the difficult and important question of how far the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," was effective in restraining combinations or agreements as to the manufacture, sale and transportation of articles of interstate commerce, the plain object of which was to enhance and maintain prices. The contention was made that the power of Congress to regulate interstate commerce was limited to its protection from acts of interference by State legislation or by means of regulations made under the authority of the State, but that it did not include the general power to interfere with

¹ 175 U. S. 212 (A. D. 1899).

or prohibit private contracts between citizens, even though such contracts had interstate commerce for their object and resulted in a direct and substantial obstruction to commerce.

The Court directly and in terms denied this, and declared that the power of Congress over commerce was far more important and necessary than the liberty of the citizen to enter into contracts of the nature mentioned, free from the control of Congress, because the results of such contracts might be the regulation of commerce among the States quite as effectually as if a State had passed a statute of like tenor as the contract. "What sound reason," it was asked, "can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." The case in hand was distinguished from that of the *United States v. E. C. Knight Company*,¹ where the combination related to the manufacture of sugar and not to commerce among the States, or with foreign nations; but where the combination had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver, it was useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended the necessary and direct result of their agreement.

The war with Spain during the spring and summer of 1898 produced a number of Prize cases which were brought

¹ 156 U. S. 1 (A. D. 1894).

finally to the court for determination. 'The Pedro' was a British built ship, formerly owned and registered in Great Britain. Subsequently she was transferred to a Spanish corporation, took a license from the Spanish Government, and thereafter sailed under the Spanish flag. She was officered and manned by Spaniards, and although insured against risks of war by British underwriters, she was held to be lawful prize, having been captured while actually trading from one enemy port to another enemy port, being herself an enemy vessel. The condemnation was sustained. A different result was reached in the *Buena Ventura*,¹ whose officers at the time of the capture were ignorant of the existence of a state of war, and were pursuing a voyage begun from a port of the United States before the commencement of the war. In the same way two fishing smacks—the *Paquette Habana* and the *Lola*² sailing under the Spanish flag, and each owned by a Spanish subject, but carrying no arms or ammunition, were restored to their owners. In *Dewey v. United States*,³ which involved an action by the renowned Admiral to recover bounty earned by him as the commanding officer of the American fleet at the naval battle of Manila, the Court, while fully mindful of the skill and heroism displayed by the officers and men, and recalling with delight and pride the marvelous achievements of our navy in that memorable engagement, declined to be swayed by considerations of that character, and firmly upheld the lower court in excluding the land batteries, mines and torpedoes not controlled by those in charge of the Spanish vessels, but which supported those vessels, in determining whether the Spanish vessels sunk or destroyed were of inferior or superior force to the American vessels. The size and armaments of the vessels sunk or

¹ 175 U. S. 354 (A. D. 1899).

² 175 U. S. 384 (A. D. 1899).

³ 175 U. S. 677 (A. D. 1899).

⁴ 178 U. S. 510 (A. D. 1899).

destroyed, together with the number of men upon them, were alone to be regarded in determining the amount of the bounty to be awarded.

The War Revenue Act of June 13, 1898, gave rise to a series of remarkable opinions in *Knowlton v. Moore*, *Plummer v. Coler* and *Murdock v. Ward*.¹ Their chief value for the future lies in the complete and exhaustive historical and legal review given by Mr. Justice White of death duties as established by the Roman and ancient law, and by the modern laws of France, Germany and other continental countries, England and her colonies, and the statutes of our own States. Taken in connection with the Income Tax cases, the Succession Tax cases contain all that the student will require to obtain a full view of the decisions upon the constitutional rules of uniformity and apportionment as applicable to taxation.

The fruits of war, particularly of foreign war, are sometimes strange exotics, and in no instance in our history is this more manifest than in the new and perplexing problems which resulted from the Spanish-Cuban War, which, while it brought glory to our arms, brought distraction to the decisions of the Supreme Court.

The first of the famous "Insular Tariff Cases," was that of *DeLima v. Bidwell*.²

The firm of D. A. DeLima & Company brought an action against the collector of the port of New York to recover back duties alleged to have been illegally exacted, and paid under protest, upon cargoes of sugar brought from the island of Porto Rico, during the autumn of 1899, and subsequent to the cession of the island to the United States.

Porto Rico had been invaded by the military forces of the United States in July, 1898. During the progress of the cam-

¹ 178 U. S. 42-149 (A. D. 1899).

² 182 U. S. Rep. 1-220 (A. D. 1900).

paign, in August, a protocol was entered into, providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. In October of the same year, the Spanish evacuated the island, and in December, a treaty was signed, by which Porto Rico was ceded to the United States. In March of the following year an Appropriation Act was passed to carry out the obligations of the treaty, and in April the ratifications were exchanged, and the treaty proclaimed. In April, 1900, the Foraker Act was passed to provide temporary revenue and a civil government for Porto Rico.

In the DeLima case the duties exacted were claimed by the Government under the Tariff Act of July 24, 1897, commonly known as the Dingley Act, which declared that "there shall be levied, collected and paid upon all articles imported from foreign countries," certain duties therein specified.

The case raised the single question whether territory acquired by the United States, by cession from a foreign power, remains a "foreign country" within the meaning of the tariff laws.

Mr. Justice Brown delivered the opinion of the Court. After disposing of the preliminary objections which had been raised to the jurisdiction of the lower Federal court, and the right to maintain the action, he addressed himself to the main question. After a careful resumé of former decisions of the Supreme Court, notably those of *United States v. Rice*,¹ *Fleming v. Page*,² and *Cross v. Harrison*,³ the instructions of the executive departments, and the Foraker Act, which made a distinction between foreign countries, and Porto Rico, by enacting that the same duties shall be paid upon "all articles imported into Porto Rico from parts other than those of the United States, which are required by law to be collected upon

¹ 4 Wheat., 246.

² 9 Howard, 603.

³ 16 Howard, 164.

articles imported into the United States from foreign countries," the learned jurist asserted that there was not a shred of authority, except the dictum in *Fleming v. Page* (practically overruled in *Cross v. Harrison*) for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. The treaty was to be regarded as the supreme law of the land, and the territory acquired under it was acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an Act of Congress. The island had become territory of the United States—although not an organized territory in the technical sense; but when once acquired by treaty, it belonged to the United States, and was subject to the disposition of Congress. Territory thus acquired could remain foreign country under the tariff laws only upon one of two theories; either that the word "foreign" applied to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remained foreign under the tariff laws until Congress had formally embraced them within the customs union of the States. The first theory was obviously untenable. A country ceased to be foreign the instant it became domestic. The second theory was objectionable because it presupposed that a country might be domestic for one purpose and foreign for another; that it might be held indefinitely by the United States; that it might be treated, in every particular, except for tariff purposes, as domestic territory; that laws might be enacted and enforced by officers of the United States; that insurrections might be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything might be done which a government could do within its own boundaries, and yet that the territory might still remain a foreign country.

That this state of things might continue for a century, but that until Congress enacted otherwise it still remained a foreign country. To hold that this could be done as matter of law, was deemed to be pure judicial legislation. The assumption that a territory might be at the same time both foreign and domestic was declared to be intolerable.

The opinion of the Court was, that at the time the duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs were entitled to receive them back.

From this opinion, and from the arguments and illustrations by which it was supported, Mr. Justice McKenna, with whom concurred Mr. Justice Shiras and Mr. Justice White, dissented. Objection was made to the antithesis attempted between a "foreign country," and "domestic territory." It was strongly contended that it could be successfully demonstrated from the Constitution itself, the immediate and continued practice under the Constitution, judicial authority, and the treaty with Spain that Porto Rico occupied a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely, and because of that relation its products were subject to the duties imposed by the Dingley Act. Any other conclusion would rob the Constitution of great and vital authorities, and deprive the United States of the power to secure "an equal station among the Powers of the earth," or to move with strength and dignity to such purpose as it may undertake or to such destiny as it may be called. The doctrine of *Fleming v. Page* was not *dictum*, and was disposed of too summarily. There was the most explicit proof to be found in the acts of the Government, in the declarations of public men, and in the judicial utterances of Chief Justice Taney that the government

and laws of the United States did not extend to acquired territory by the mere act of cession. The opinion of the majority was erroneous because it proceeded upon the wrongful assumption of the incorporation of Porto Rico. The Constitution and law did not apply immediately to newly acquired territory upon a mere cession of territory. Such a consequence was fraught with danger.

Mr. Justice Gray dissented from the judgment because it appeared to him to be irreconcilable with *Fleming v. Page*, and with the opinion of the majority of the Justices in the case of *Downes v. Bidwell*, which will be reviewed hereafter.

The case of *Dooley v. The United States*¹ raised the the question of the legality of duties upon imports from the United States to Porto Rico, collected by the military commander and by the President as Commander-in-Chief, from the time possession was taken of the island until the ratification of the treaty of peace.

It was held that they were legally exacted under the war power; and that as the right to exact duties upon importations from Porto Rico to New York ceased with the ratification of the treaty of peace, the correlative right to exact duties upon imports from New York to Porto Rico also ceased at the same time.

The opinion of the Court was delivered by Mr. Justice Brown. He divided the duties exacted in this case into three classes: (1) The duties prescribed by General Miles under order of July 1, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander-in-Chief, which continued until the ratification of the treaty and the cession of the island; (3) from the ratification of the treaty to May 1, 1900, when the Foraker Act went into effect.

¹ 182 U. S. Rep., p. 222 (A. D. 1900).

The first two of these classes were justified under an exercise of the powers of war. When, through the occupation of the country by the army of the United States, Spanish authority was superseded, the necessity for a revenue did not cease. The government had to be carried on, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting that method, General Miles was fully justified by the laws of war. The right to exact duties imported into Porto Rico from New York arose from the fact that until the ratification of the treaty of peace New York was still a foreign country with respect to Porto Rico, and from the correlative right to exact at New York duties upon merchandise imported from that island. When, however, peace was established Porto Rico ceased to be a foreign country, and the right to exact duties ceased, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject.

From this judgment Mr. Justice White dissented, his views being shared by Justices Gray, Shiras, and McKenna. So far as it was held that the duties collected prior to the ratification of the treaty were legally and validly collected, he concurred; but so far as it was decided that the duties collected after the ratification were illegal, he dissented in strong terms. He contended that there was a *non sequitur* involved in stating the question whether Porto Rico was a foreign country within the meaning of the tariff laws, and then discussing the totally different question whether the territory ceded by Spain came under the sovereignty of the United States by the effect of the cession. He protested against this confusion and relied upon the doctrine contained in *Fleming v. Page*. He protested, too, that as the treaty with Spain

had provided that "the civil rights and political status of the native inhabitants should be determined by Congress," this provision should not be controlled by conclusions deduced from former treaties made by the United States, which contained no such provision. Besides, the rule of the immediate bringing, by the self operating force of a treaty, ceded territory inside of the line of the tariff laws of the United States denied the existence of powers which the Constitution bestowed, overthrew the authority conferred on Congress by the Constitution, and was impossible of execution. These views he enforced in an argument of great power. "It must follow that, as long as a locality is in a position where it is subject to the power of Congress to levy an impost tariff duty on merchandise coming from that country into the United States, such country must be a foreign country *within the meaning of the tariff laws*. Now, this Court has just decided in *Downes v. Bidwell*, that, despite the treaty of cession, Porto Rico remained in a position where Congress could impose a tariff duty on goods coming from that island into the United States. If, however, it remained in that position, how then can it be now declared that it ceased to be in that relation because it was no longer a foreign country within the meaning of the tariff laws?"

The case of *Downes v. Bidwell*,¹ which in the judgment of four justices was in conflict with *DeLima v. Bidwell*, and while sustained by the dissenting judges in that case, was dissented from by four other justices who had concurred with the *DeLima* case, presented no such conflict or difficulty in the mind of Mr. Justice Brown, who had delivered the opinions in the *DeLima* and *Dooley* cases. To his mind, Porto Rico, as the result of war, had ceased to be foreign, and had become domestic territory, but it had not become a part of the United

¹ 182 U. S. Rep., 246 (A. D. 1900).

States within that provision of the Constitution which declares that "all duties, imposts and excises shall be uniform throughout the United States." The case, as stated by him, involved the question whether merchandise brought into the port of New York after the passage of the Foraker Act was exempt from duty, notwithstanding the third section of that act, which required the payment of "fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries." The Court, having held, in the DeLima case, that upon the ratification of the treaty, Porto Rico had ceased to be a foreign territory and had become a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island, was now confronted with the question did it become a part of the United States within the meaning of the uniformity clause of the Constitution as to duties, imposts and excises? Did the revenue clauses of the Constitution extend of their own force and vigor to the newly acquired territory?

After a long, learned, and interesting historical and judicial review of the precedents, he concluded that there was a clear distinction between such prohibitions as went to the very root of the power of Congress to act at all, irrespective of time and place, and such as were operative only "throughout the United States," or among the several States. By the term "United States," he understood the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them. "We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution ; that the Foraker Act is constitutional, so far as it imposes duties upon

imports from such island, and that the plaintiff cannot recover back the duties exacted in this case."

Mr. White, Justice, in an opinion concurred in by Justices Shiras and McKenna, united in this judgment. Mr. Justice Gray also concurred in a separate opinion. But while there was concurrence in the result reached by Mr. Justice Brown, which was dissented from by Chief Justice Fuller, and Justices Harlan, Brewer and Peckham, there was a wide divergence of view as to the reasons upon which such a conclusion ought to stand.

This contrariety, or rather dissimilarity of view, which led the official reporter to state that "there is no opinion in which a majority of the court concurred," recalls to the mind of the reader a similar declaration on the part of Mr. Howard when reporting the *Passenger* cases in the year 1849.¹

After pointing out that the Government of the United States is born of the Constitution, and all its powers are derived from that instrument either expressly or by implication, and that the Constitution is everywhere and at all times potential so far as its provisions are applicable, Mr. Justice White insisted that as Congress, in governing the territories, is subject to the Constitution, it must result that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It followed, also, that every provision of the Constitution which is applicable to the territories is also controlling therein. But, in the case of the territories, as in every other case, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable. As Congress derived its authority to levy local taxes for local

¹ *Smith v. Turner*, *Norris v. City of Boston*, 7 Howard, 283 (ante, p. 332).

purposes within the territories, not from the general power to tax as expressed in the Constitution, it followed that its right to locally tax is not to be measured by the provision conferring Congress "to lay and collect taxes, duties, imposts and excises," and is not restrained by the requirement of uniformity throughout the United States.

Mr. Justice Gray maintained that the civil government of the United States could not extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander-in-Chief. Civil government, in a conquered territory, could only be put in operation by the action of the appropriate political department of the Government, at such time and in such degree as that department might determine. So long as Congress had not incorporated the territory into the United States, neither military occupation, nor cession by treaty made the conquered territory domestic territory, in the sense of the revenue laws. Congress, if not ready to construct a complete government for the conquered territory, might establish a temporary government, which is not subject to all the restrictions of the Constitution.

From these views Mr. Chief Justice Fuller dissented. The real question was whether, when Congress had created a civil government for Porto Rico, had constituted its inhabitants a body politic, had given it a governor and other officers, a legislative assembly and courts, with the right of appeal to the highest court of the nation, Congress could in the same act and in the exercise of the power conferred by the Constitution, impose duties on the commerce between Porto Rico and the States and other territories in contravention of the rule of uniformity qualifying the power. If this could be done, it was because the power of Congress over commerce between the States and territories was

not restricted by the Constitution. That was the position taken by the Attorney-General. But that position had been rejected and the contention seemed to be that if an organized and settled province of another sovereignty was acquired by the United States, Congress had the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period ; and, more than that, that after it had been called from that limbo, commerce with it was absolutely subject to the will of Congress irrespective of Constitutional provisions. The accuracy of such a view was denied.

Mr. Justice Harlan rejected altogether the theory that Congress, in its discretion, could exclude the Constitution from domestic territory of the United States, acquired, and which could only have been acquired in virtue of the Constitution. He could not agree that Porto Rico was a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirements that *all* duties, imposts and excises imposed by Congress, "should be uniform throughout the United States." How Porto Rico could be a domestic territory of the United States as distinctly held in *DeLima v. Bidwell*, and yet, as was now held, not embraced by the words, "throughout the United States," was more than he could understand.

In these dissenting views Justices Brewer and Peckham concurred.

The recent decisions in the *Diamond Rings* case and the second *Dooley* case confirm and extend the results already stated. In *DeLima v. Bidwell* and *Dooley v. United States* it had been held that instantly upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country within

the meaning of the tariff laws of the United States. In support of that conclusion it was decided that the terms export and import relate to a foreign country alone, that the words foreign country signified a country outside of the sovereignty of the United States and beyond its legislative authority. In the case of the Diamond Rings, it was held that the Philippine Islands immediately upon the ratification of the treaty ceased to be foreign country within the meaning of the tariff laws. As these islands were acquired by the same treaty by which Porto Rico was acquired, the ruling was predicated upon the DeLima and Bidwell cases. It is clear from the further discussion of the matter that the dissents previously announced did not rest upon the theory that Porto Rico or the Philippine Islands had not come under the sovereignty and become subject to the legislative authority of the United States, but were based on the ground that legislation by Congress was necessary to bring the territory within the line of the tariff laws in force at the time of the acquisition; and especially was this the case where the new territory had not, as the result of the acquisition, been incorporated into the United States as an integral part thereof, though under its sovereignty, and subject, as a possession, to the legislative power of Congress.

The opinions just reviewed constitute a new landmark in the ever expanding realm of jurisprudence. They stand at the gateway to an unexplored region, full of mystery and alarm for the timid, but soon to be subdued by the searching rays of judicial wisdom. With new territory, new conditions of life and new international relations complications, both foreign and domestic, will inevitably arise to bear fruit, both sweet and bitter, in the irrepressible crop of litigated questions. The task of settling these will devolve in large part upon new judges, who, appearing one by one upon the bench, will be steadied by



C. W. Dames

the ripe wisdom and conservative habits of their senior associates, who, before passing in their turn, will exert the strength of experience and tradition in restraint of a too rapid change of judicial methods of exposition.

The retirement and subsequent death of Mr. Justice Gray, and the succession of Mr. Justice Holmes, present the first decided evidence of a new era. The gigantic form and intellectual activity and vigor of Mr. Justice Gray yielded, after more than twenty-one years of arduous service in the court of last resort, to the stealthy but sure approach of disease. On the 9th of July, 1902, broken in health, and but the sad semblance of his glorious prime, he tendered his resignation to take effect upon the appointing and qualifying of his successor. He died of paralysis at Nahant, Massachusetts, on the 15th of September of the same year. The eyes of President Roosevelt turned to Massachusetts in search of some one fit to fill the place which had been held by Cushing, Story and Curtis. But one name presented itself—a name honored and honorable in medicine and in literature, as well as in law; of a type new to our national jurisprudence, and of a scholarship and training original and peculiar.

Oliver Wendell Homes, Jr., was born in Boston, Massachusetts, March 8, 1841, the son and namesake of the genial and famous author of "The Autocrat of the Breakfast Table," "Elsie Venner" and "Old Ironsides." His blood was not without a legal strain, for his mother was a daughter of Charles Jackson, for ten years a member of the Supreme Judicial Court of Massachusetts and a former leader of the bar. His early education was received at the private school of Mr. T. R. Sullivan and Mr. E. S. Dixwell. He became an undergraduate at Harvard College in the class of 1861, but his studies were interrupted by the call to arms. He joined the Fourth Battalion

of Infantry, then stationed at Fort Independence in Boston Harbor, under the command of Major Thomas G. Stevenson, and while in uniform and under drill found time to write the class poem, which he was permitted to deliver upon Class Day. He was soon at the front and in the thick of the fight, sharing the dangers and glory of the 20th Massachusetts Regiment of Volunteers. His service was active and dangerous. At Ball's Bluff he was twice wounded, being struck upon the breast and in the abdomen. At Antietam he was wounded in the neck, and in the desperate charge upon Marye's Heights near Fredericksburg he was wounded in the heel. He rose from the first lieutenancy to become the lieutenant colonel of his regiment, although not formally mustered in, owing to the losses which the regiment had sustained, and in January, 1864, was appointed A. D. C. upon the staff of Brigadier General H. G. Wright, then commanding the First Division of the Sixth Corps, but later as major general commanding the corps, and served with him until mustered out of service at the end of his term of enlistment.

From arms he turned to law. In September, 1864, he entered the Harvard Law School, and received the degree of LL. B. in 1866, studying in the meantime in the office of Hon. Robert M. Morse. After a summer in Europe, climbing the Alps and invigorating his health, he entered the office of Messrs. Chandler, Shattuck & Thayer, and on the 4th of March, 1867, he was admitted to the Suffolk Bar. Some years later his name was enrolled as a practitioner of the Supreme Court of the United States. For fifteen years he was active in local practice as a partner of his brother, and in 1873 formed a copartnership under the style of Shattuck, Holmes & Munroe. His tastes and achievements, however, were most noticeable in the field of legal literature and his activity and productiveness were remarkable. In 1870-71 he taught constitutional law in

Harvard College, and in 1871-72 became a University lecturer upon jurisprudence.

On the 17th of June, of the latter year, he married Miss Fanny Dixwell, the daughter of his old school teacher, who traced his descent from John Dixwell, the regicide. The next year he edited, with elaborate notes, the 10th edition of Kent's Commentaries, which exhibited the extent and accuracy of his scholarship and his indefatigable industry. About the same time he was the editor in charge of "The American Law Review," and was the author of many leading articles. In these he swept, as Story had delighted to do, through the vast bounds of jurisprudence, contrasting the common and the civil law, and winning fame and applause abroad as well as at home. A student of Montesquieu, as well as of the Code and the Pandects, he devoted himself also to the scientific consideration of the common law, and in the winter of 1880 he delivered a series of lectures upon the latter subject at the Lowell Institute, which constituted the basis of the book published in 1881, which was declared by "The London Spectator" to be "the most original work of legal speculation which has appeared in English since the publication of Sir Henry Maine's 'Ancient Law.'" The work was translated into Italian, and is recognized by jurists everywhere as a profound as well as learned treatise, giving a new impetus to juridical inquiry, and a new light to legal research. So great was the fame of the book that a new professorship was created for him in the Harvard Law School. In less than a year his duties were suddenly changed. The scholar of the cloisters was summoned into active, practical life, exchanging his professor's gown for the robes of the judge, becoming, under the appointment of Governor George D. Long Associate Justice of the Supreme Judicial Court of Massachusetts upon the resignation of Judge Otis P. Lord, in December, 1882. Upon

the death of Chief Justice Field, in 1899, he became, as Mr. Justice Gray had done before him, the Chief Justice of his native State, and from this high post he was summoned to the bench of the Supreme Court of the United States. His commission is dated December 4, 1892, and he qualified and took his seat on December 8th. Harvard and Yale have both conferred upon him the degree of LL.D., the latter bestowing it at the same time that his illustrious father received a similar honor from venerable Oxford.

On the twenty-third of February, 1903, after a service of ten years and upwards, Mr. Justice Shiras resigned his seat upon the bench. He had impressed upon his colleagues and the bar the single-mindedness with which he sought to do equal and exact justice, and the earnestness of his efforts to perform his judicial duties was at all times conspicuous. His labors had been of value in assisting the Court in consultation, and he had made notable contributions to jurisprudence. He had won the affection and regard of his associates, and the occasion of his retirement was made the subject of a graceful and impressive correspondence.¹

On the second of March following, William R. Day, of Ohio, was appointed as his successor.

No one could have been chosen whose selection better illustrates the truth that men called to high places represent and embody the spirit and accomplishments of their time. Prominence, even when of sudden growth, ripens into leadership, and affords illustrations of the fitness and readiness of the well-trained American to meet with courage and capacity the exigencies of new and untried situations. In this respect the opportunities for distinction in jurisprudence are as remarkable and as unforeseen as those in literature or in arms. A poet

¹ 188 U. S. Rep., VII



William R. Day

may awaken on some eventful morning and find himself famous; a soldier may become world renowned through stubborn resistance to a siege; or a commodore may win the applause of the world and the high position of admiral through a boldly executed plan or a well directed fire. A lawyer may command attention by an argument of supreme power, or display in the management of public questions those qualities which mark him as fitted for the bench. His neighbors may little suspect the reserve power of some quiet citizen until the occasion reveals the man as equal to a crisis in national affairs, and possessed of that particular force of character which compels results of far-reaching effects.

It is doubtful whether in the list, now a long one, of Associate Justices any one of them (with the possible exception of Trimble and Miller) passed so rapidly as Mr. Justice Day from the modest station of a general practitioner of law in a quiet town of moderate size through posts of unusual responsibility, occupied in turn for but a brief time, to a seat upon the bench of our most august tribunal. "Mine are but the short and simple annals of the poor," said he, with characteristic modesty, but with a charming inflection of the voice, and a sparkle of humor in the eye which made the declaration a striking one, indicative of culture and refinement, as well as entire freedom from the affectations of high place.

William Rufus Day was born at Ravenna, Ohio, April 17, 1849. His aptitude for the law was inherited. His father, the Honorable Luther Day, a most capable trial lawyer, was for many years a member of the Supreme Court of Ohio, excelling in lucidity of statement and comprehensiveness of view—traits which the more distinguished son has often displayed. His mother was the daughter of Judge Spalding, also of the Supreme Court of Ohio, and the granddaughter of Chief

Justice Swift, of Connecticut. The boy, after careful preparation for college, matriculated at the University of Michigan in the Department of Literature, Science and the Arts in September, 1866, and was continuously in attendance until his graduation in June, 1870. A classmate has declared that he doubts if any of his student acquaintances would have predicted for him the remarkable career which has been his, and yet those who knew him best could easily recall an intellectual grasp much above the average, a capacity to master thoroughly whatever he seriously undertook, and above all a temperament that led him to reach conclusions only after a careful consideration of the question from all points of view. He had poise of judgment and excellent common sense, and while modest and retiring, always gave his opinion when the occasion demanded it in brief, clear, precise, but comprehensive words. Though not ambitious of university honors, he mastered the tasks of the class room with ease. Returning to his native town, he read law in the office of Judge G. F. Robinson for eighteen months, and after a year's attendance upon law lectures at Ann Arbor, was admitted to the bar of Ohio, and became the junior member of a partnership in October, 1872, with William A. Lynch, Esquire, at Canton. Here he formed the acquaintance, soon to ripen into a life long intimacy leading to all his subsequent honors, of Major William McKinley, Jr., then the prosecuting attorney of Stark county, and, twenty-five years later, President of the United States. After fourteen years of persistent devotion to office work and the trial of cases—his partnership associations changing from time to time—Mr. Day was elected, in the spring of 1886, Judge of the Common Pleas Court of the Ninth Judicial District of Ohio. He held the office but a single year, resigning, as so many capable judges have done, because of the impossibility of supporting his family upon his judicial salary.

His judicial qualities, however, had attracted the eye of President Harrison, himself one of the foremost of lawyers and quick and unerring in his recognition of the pattern and mental structure of a judge, who, in 1889, appointed him United States District Judge for the Northern District of Ohio, a post most acceptable to his inclinations, but declined on the ground of delicate health. After a summer and fall in the woods of Northern Michigan, he returned to the scene of his labors with renewed vigor. The following eight years were spent in varied practice before State and Federal tribunals with constantly increasing reputation as a safe and judicious counsellor, and an accomplished trial lawyer. During the troubled months which preceded the declaration of the war with Spain, though still in private station, his advice was frequently sought upon public matters, of which he had exact and discriminating knowledge, and upon which he maintained a firm and tenacious grasp, until, in April, 1897, he was appointed by President McKinley Assistant Secretary of State. In point of fact, owing to the age and infirmities of Secretary of State John Sherman, Mr. Day was virtually the Premier, going over the business of the department with the President before and after Cabinet meetings with such delicacy, tact and success as never to offend his official chief or wound his sense of dignity. Upon Mr. Sherman's retirement in May, 1898, Mr. Day became Secretary of State. With characteristic public spirit, he asked that Professor John Bassett Moore, a Democrat in politics, should be appointed Assistant Secretary, because of his undoubted knowledge of international law, but no one discovered any lack of self reliance or any disposition to shrink from the responsibilities of the higher place. Senators and representatives, as well as foreign ministers, found in the new Secretary a strong and silent man, with whom repeated contact deepened the impres-

sion of his power and self possession at a time of great public excitement and vexatious problems of difficulty. The President, in acknowledging his services, declared concisely: "Judge Day has made absolutely no mistakes." Upon the close of the war between the United States and Spain, Mr. Day, although anxious to retire to private life, consented, at the urgent solicitation of the President, to act as a member of the Peace Commission, and played a conspicuous and honorable part in the negotiations which led to the Treaty of Paris. Like Ellsworth and Marshall, he was successful as a diplomat. Widely known as a statesman of achievements, he withdrew from public life honored by his countrymen and admired abroad for the simplicity, directness, firmness and prudence of his conduct, and the transparent beauty of his character.

It was impossible to permit him to remain in retirement. The country had need of him. In February, 1899, he was appointed Judge of the Circuit Court of the United States for the Sixth Judicial Circuit. In his new field of action, his fitness for the bench became so manifest that his name was soon associated with still higher place. His promotion was made possible by the resignation of Mr. Justice Shiras, and on the second of March, 1903, he was duly appointed an Associate Justice of the Supreme Court of the United States.

His public life is comprised, and his laurels have been won, within the last six years.

Since the days of Chief Justice Taney the sessions of the Supreme Court have been held in a crescent-shaped room near the Rotunda of the Capitol, formerly occupied by the Senate of the United States. The associations and traditions of this small, though imposing chamber throng upon the mind and detain the reverent stranger. Here Webster and Clay contended against Calhoun, Hayne, Benton and Wright.

Here Charles Sumner appeared at the bar, on the 1st of February, 1865,—less than ten years after the decision in *Dred Scott v. Sandford* had been pronounced,—and moved for the admission of John S. Rock, of Massachusetts, a colored man. Here the sessions of the Electoral Commission were held, and here was the scene of many memorable arguments. Although the system of railroads and the consequent ease of communication with all parts of the country, as has been observed by Mr. Justice Bradley, now enable local counsel to argue their own cases, and have had the effect of lessening the elevated and eclectic character of the arguments made before the Court, yet here have appeared those redoubted leaders, Curtis and Campbell, Charles O'Connor, David Dudley Field, William M. Evarts, William Allen Butler and Clarkson N. Potter, of New York, Richard H. Dana, Jr., of Massachusetts, Reverdy Johnson and S. Teakle Wallis, of Maryland (the latter a pupil of Wirt), Jeremiah S. Black, Brewster and Ashton, of Pennsylvania, Henry Stanbery and James A. Garfield, of Ohio, George F. Edmunds and Edward J. Phelps, of Vermont, Henderson, of Missouri, McDonald, of Indiana, Merrick and Phillips, of the District of Columbia, and a host of brilliant, able and learned advocates,—*duplex gemmis auroque corona*,—whose fame is a part of the glory of the Court, and the result of whose labors has been woven into the warp and woof of our Constitutional jurisprudence.

As the eye of the visitor sweeps from the marble busts of the dead Chief Justices to the living figures upon the bench and to the animated dialectician at the bar, the genius of the place seems to speak in the stately words of Clarendon: "The law is the standard and guardian of our liberty; it circumscribes and defends it; but to imagine liberty with-

out law is to imagine every man with a sword in his hand to destroy him who is weaker than himself."

With the cases reviewed in the present chapter, we conclude this history of the Court. Although many decisions, important in their relation to the jurisprudence of the nation and to the science of law have been necessarily passed over in silence, yet a sufficient number of the Leading Cases of each epoch have been selected to enable the reader to judge of the spirit and character of the results accomplished. The steady expansion of principles, and the vigorous as well as irrepressible growth of the doctrine of Nationality are conspicuous phenomena. Constitutional provisions have been vitalized; Acts of Congress have been made to breathe; situations, conditions and circumstances, unprovided for by either, have been nurtured into living forces, presenting, when drawn up in array, a noble and imposing body of jurisprudential facts which, when studied and understood, will prove the best title to renown of the distinguished jurists to whose care and protection they were committed, the ceaseless source of the gratitude and veneration of posterity, and the best and most enduring bulwark of National greatness. As the safety of Troy depended upon the preservation of the heaven-descended statue of Pallas, holding a spear in her right hand, and in her left a distaff and spindle, so the Supreme Court of the United States, enthroned in majesty and invested with power, wielding the imperial sceptre of National Sovereignty, while jealously guarding the rights of the States, will prove, as long as our institutions endure, the Palladium of the Republic.

CHAPTER XXII.

REPORTERS OF THE DECISIONS OF THE SUPREME COURT
OF THE UNITED STATES.

ALEXANDER JAMES DALLAS.

THE first Reporter of the Decisions of the Supreme Court of the United States, although not officially appointed, was Alexander James Dallas, who was born on the Island of Jamaica on the 21st of June, 1759, and died in Trenton, New Jersey, upon the 14th of January, 1817. He was the son of a Scotch physician, who had emigrated to Jamaica, and resided there several years. Young Dallas was educated in Edinburgh and at Westminster. While a student, he made the acquaintance of Dr. Johnson, the celebrated lexicographer, and of Dr. Franklin, who was then pleading before the Privy Council the rights of the Assembly of Pennsylvania against the Proprietaries. He studied law in the Inner Temple, and returned to Jamaica in the year 1780, and upon his mother's second marriage removed in April, 1783, to Philadelphia, where he took the oath of allegiance to the Commonwealth of Pennsylvania. A few years later he was admitted to practice, and became eminently successful as a lawyer, ranking among the leaders of the bar. His name appears in all the prominent cases, and in January, 1791, he was appointed Secretary of the Commonwealth of Pennsylvania, and in December, 1793, his commission was renewed.

During this time he was editor of the *Columbian Magazine*. He prepared an edition of the "Laws of Pennsylvania with notes," and also compiled his four volumes of "Reports of Cases ruled and adjudged by Courts of the United States and Pennsylvania before and since the Revolution," which were published in Philadelphia, and which constitute the earliest series of American Reports. He served as Paymaster-General to the armed forces at Pittsburgh in 1794, and became again Secretary of State of Pennsylvania in 1796. He was appointed by President Jefferson United States District Attorney for the Eastern District of Pennsylvania, serving from 1801 until 1814, and conducting many famous prosecutions, notably that against General Michael Bright and others, for forcibly obstructing Federal process. In 1814 he was appointed by President Madison Secretary of the Treasury. During his administration of this Department he displayed great ability and did much to sustain the public credit, while his energetic measures advanced the value of Treasury notes. To him is due the credit of re-establishing the United States Bank in 1816. The Bill as first passed had been vetoed by Madison in the preceding year, but a similar measure was subsequently approved and the Bank established owing to the influence of Mr. Dallas and his explanation of the necessity and efficiency of such a means to sustain and improve the credit of the Government. Mr. Dallas also discharged the duties of Secretary of War, and having fully succeeded in rescuing the Government from a financial crisis, retired from office and returned to Philadelphia, but died a few weeks later. He also published Treasury Reports, "Features of Jay's Treaty," Philadelphia, 1795; "Speeches on the Trial of Blount," "Address to the Society of Constitutional Republicans," 1805, and "Exposition of the Causes and Character of the War of

1812." He left unfinished a "History of Pennsylvania." His son, George Mifflin Dallas, became Vice-President of the United States in 1845, and died in 1864. He had prepared for the press the "Life and Writings of A. J. Dallas," which was published in 1871.

WILLIAM CRANCH.

The first regularly appointed Reporter of the Decisions of the Supreme Court of the United States and the successor of Mr. Dallas was William Cranch, who was born at Weymouth, Mass., July 17th, 1769, and died at Washington on the 1st of September, 1855. His father, Richard Cranch, was a native of England, and for many years was a member of the Massachusetts Legislature, a Judge of the Court of Common Pleas, and the author of "Views of the Controversies concerning Anti-Christ." His son graduated at Harvard in 1789, studied law, and was admitted to the Bar in July, 1790. After three years' practice in the Courts of Massachusetts and New Hampshire, he removed to Washington, and in 1801 was appointed by President Adams Assistant Judge of the Circuit Court of the District of Columbia. In 1805 President Jefferson made him Chief Justice of this Court, which position he held until 1855. During this period only two of his decisions were overruled by the Supreme Court of the United States. Among the last services imposed upon him by Congress was the final hearing of patent causes after an appeal from the Commissioner of Patents. He published nine volumes of the Decisions of the Supreme Court of the United States, and six volumes of Reports of Decisions of the Circuit Court of the District of Columbia from 1801 to 1814. He also prepared a Code of Laws for the District, and published

in 1827 a "Memoir of John Adams," and in 1831 an address upon "Temperance."

HENRY WHEATON.

The third Reporter of the Decisions of the Supreme Court was Henry Wheaton, who was born in Providence, Rhode Island, upon the 27th of November, 1785, and died at Dorchester, Mass., on the 11th of March, 1848. His father, Robert Wheaton, was a Baptist clergyman, who emigrated from Wales to Salem, Mass., but subsequently settled in Rhode Island. Henry graduated from Brown University in 1802, and studied law with Nathaniel Searle, was admitted to the Bar in 1805, and in the same year continued his studies in Poitiers and London. Returning home, he practiced in Providence until 1812, when he removed to New York, where he edited for three years the *National Advocate*, the organ of the Administration party. He published in this paper notable articles on questions of neutral rights in connection with the existing war with England. In 1814 he became a Judge Advocate in the army, and in 1815 a Justice of the Municipal Court of New York City, serving until 1819. From 1816 to 1827 he was the Reporter of the Supreme Court of the United States, and published twelve volumes, which were printed in New York. He was an intimate friend of Mr. Justice Story, from whom he received much encouragement and assistance in his studies of international law and in the work of reporting the decisions of the Supreme Court. In fact, many of the learned and elaborate notes upon questions of international law and upon the practice of Admiralty and Prize Courts, which are published in the appendices to his volumes, were written by that eminent

jurist. Many of the most famous decisions of Marshall appear in his pages, and his work was termed by a German reviewer, "The Golden Book of American Law." William Beach Lawrence says: "The reputation which Mr. Wheaton acquired as a reporter was unrivaled. He did not confine himself to a mere summary of the able arguments by which the cases were illustrated; but there is scarcely a proposition on any of the diversified subjects to which the jurisdiction of the Court extends that might give rise to serious doubts in the profession that is not explained, not merely by a citation of authorities adduced by counsel, but by copious views which the publicists and civilians have taken of the questions." He was a member of the New York Constitutional Convention in 1821, and of the New York Assembly in 1823 and 1825, and was associated with John Duer and B. F. Butler on the Commission to revise the Statute Laws of New York. In 1827 he became Chargé d'Affaires in Denmark, and was the first diplomatist from the United States who acquired a reputation in Continental languages and literature. He became a member of the Icelandic Society. In 1835 he was appointed Resident Minister at the Court of Prussia, and in 1837 was made Minister Plenipotentiary. He received full power to conclude a treaty with the Zollverein, pursuing this object for six years. Upon the 25th of March, 1844, he signed a treaty with Germany, for which he received high commendation from President Tyler and from John C. Calhoun; the treaty was rejected by the Senate, but served as a basis for subsequent agreement. In 1846 he was recalled by President Polk, but the act provoked public condemnation. Mr. Wheaton, however, complied, and on his return to the United States was honored by public dinners in New York and Philadelphia, and was at once chosen lecturer on International

Law at Harvard University. This place he was too ill to accept. He was a corresponding member of the French Institute, and a member of the Royal Academy of Berlin. Brown University conferred the degree of LL.D. upon him in 1819, and Harvard in 1825. He delivered many public addresses, those before the New York Historical Society on the Science of Public or International Law being published in 1820. His most important work is entitled "Elements of International Law," published in Philadelphia in 1831 in two volumes, and in London in the same year. The work was translated into French, and published at Leipsic and Paris in 1848. It was at once acknowledged as a standard authority, and has also been translated into Chinese, and was published at the expense of the Imperial Government in four volumes at Peking in 1865. It was also translated into Japanese, and the eighth edition appeared in Boston in 1866. This edition unfortunately gave rise to an unpleasant controversy between its annotator, Hon. Richard H. Dana, Jr., and Hon. W. B. Lawrence, who had edited the sixth edition. Mr. Wheaton published also "Considerations on Establishing a Uniform System of Bankrupt Laws throughout the United States," "A Digest of the Decisions of the Supreme Court of the United States from its Establishment in 1789 to 1820," a "Life of William Pinkney," published in New York in 1826, and a "History of the Northmen," published in London in 1831 and translated into French in 1844. His "*Histoire du Progrès du Droit des Gens en Europe*," published in 1841, was translated into English in 1845 under the title, "A History of the Law of Nations in Europe and America." It is still the leading work on the subject of which it treats.

RICHARD PETERS.

Mr. Wheaton was succeeded as Reporter by Richard Peters, who was the son of the Hon. Richard Peters, United States District Judge of the District of Pennsylvania, and a member of the old Continental Congress. He was born at Belmont, Philadelphia, on the 17th of August, 1780, and died on the 2nd of May, 1848. He studied law and was admitted to the Bar in 1800, and was Solicitor of Philadelphia County from 1822 to 1825, and one of the founders of the Philadelphia Savings Fund, the oldest institution of that kind in Pennsylvania. He published seventeen volumes of "Decisions of the Supreme Court of the United States," from 1828 to 1843; also "Reports of the Decisions of the United States Supreme Court" from 1803 to 1818, published at Philadelphia in 1819; also "Condensed Reports of Cases in the Supreme Court of the United States, from its organization until 1827," in six volumes, which were published in 1835, and a full and well-arranged "Digest of Cases determined in the Supreme, Circuit, and District Courts of the United States from the period of organization," contained in three volumes, bringing the decisions down to 1839, and a new edition in two volumes, bringing them down to 1848. He edited "Chitty on Bills of Exchange," in three volumes, and Washington's "Circuit Court Reports," in four volumes, the former being published in 1819, the latter between 1826 and 1829.

BENJAMIN CHEW HOWARD.

Mr. Peters was succeeded by Benjamin Chew Howard, who was born in Baltimore County, Maryland, on the 5th of September, 1791, and died upon the 6th of March, 1872. He

was the son of Governor John Eager Howard, who had displayed his gallantry at the battles of Cowpens and Eutaw Springs. He was also the grandson of Benjamin Chew, who was Chief Justice of Pennsylvania before the Revolution. Mr. Howard graduated at Princeton in 1809, studied law, and practiced in Baltimore. In 1814 he assisted in organizing troops for the defence of his native city, and commanded the "Mechanical Volunteers" at the battle of North Point, upon the 12th of September, 1814. From 1829 to 1833 he was a member of Congress, having been elected as a Democrat, and again from 1835 to 1839, when he served as Chairman of the Committee on Foreign Relations, and drew up its report on the Northeastern Boundary question. In 1843 he was appointed Reporter of the Supreme Court of the United States, and held that post until 1862, publishing twenty-four volumes of Reports. In February, 1861, he was a delegate to the Peace Congress, which vainly tried to avert civil war. Princeton College conferred upon him, in 1869, the degree of LL.D.

JEREMIAH S. BLACK.

His successor was Jeremiah Sullivan Black, who was born in the Glades, Somerset County, Pennsylvania, upon the 10th of January, 1810, and died at York, in that State, on the 19th of August, 1883. He was of Scotch Irish descent, his grandfather being James Black, who came to this country from the North of Ireland and settled in Somerset County, Pennsylvania, where his son Henry, the father of Jeremiah, was born in 1778, and became a noted man. Jeremiah studied law in the office of Chauncey Forward, a lawyer of Somerset County, and was admitted to the Bar in 1831. After eleven years of successful practice, he was raised to the Bench. A Jeffersonian

Democrat, he was nominated in September, 1842, to be President Judge of the District where he lived, and held this post for nine years. In 1851 he was elected by popular vote a Judge of the Supreme Court of Pennsylvania, and having drawn the lot for the short term, became thereby Chief Justice. He was then re-elected, in 1854, as an Associate Justice for the full term of fifteen years but resigned to become Attorney-General of the United States in President Buchanan's Cabinet in 1857. In 1860 he was appointed Secretary of State, and was succeeded by Edwin M. Stanton as Attorney-General. He maintained the duty of the Federal Government to defend itself against insurrection. He retired in 1861, and was appointed Reporter of the Decisions of the Supreme Court of the United States, but after publishing two volumes, resigned his post, and resumed his practice of law in York. During the later years of his life he became one of the leaders of the Bar of the Supreme Court of the United States, and was engaged in the most important causes, retaining his vigor and professional ability to the end. His arguments firmly established his reputation as an advocate of surpassing power. He was one of the counsel who appeared before the Electoral Commission in 1877, was a frequent contributor to periodical literature, entered into a newspaper discussion with Jefferson Davis, and also engaged in theological controversy with Robert G. Ingersoll. He was a follower of Rev. Alexander Campbell, the founder of the religious body calling themselves "Disciples of Christ."

JOHN WILLIAM WALLACE.

The seventh Reporter was John William Wallace, a son of John Bradford Wallace, a noted lawyer of the Philadel-

phia bar. He was born in Philadelphia upon the 17th of February, 1815, and died there on the 12th of January, 1884. He was a graduate of the University of Pennsylvania in 1833, studied law in Philadelphia and subsequently in the Temple at London, and became a standing Master in Chancery in the Supreme Court of Pennsylvania in 1844. He was Reporter of the Third Circuit of the United States Circuit Court, publishing three volumes of decisions from 1842 to 1853, and in 1863 was appointed Reporter of the Supreme Court of the United States, publishing its decisions from that time, in twenty-three volumes until 1876. From 1860 to 1884 he was President of the Historical Society of Pennsylvania. He also published "The Reporters," chronologically arranged, with occasional remarks upon their respective merits (Philadelphia, 1843). He edited and revised many works, and was the author of many learned and scholarly addresses on historical subjects.

WILLIAM TODD OTTO.

The eighth Reporter was William Todd Otto, who was descended from a long line of physicians, one of whom emigrated from Germany in the year 1752, and served in the Hospital at Valley Forge during the War of the American Revolution, while his son was an officer in the army during the same struggle. Mr. Otto was born in Philadelphia on the 19th of January, 1817, graduated from the University of Pennsylvania in 1833, studied law under Joseph R. Ingersoll, an eminent practitioner and eloquent advocate, and moved to Indiana where he was admitted to the Bar. He followed his profession until 1844, when he held the office of Judge of the District Court of Indiana for six years, also serving as Professor of Law in the University of Indiana, from which in

stitution he received the degree of LL.D. In 1871 he was appointed arbitrator in behalf of the United States in the Convention with Spain for the settlement of claims of citizens of this country. Upon Mr. Wallace's resignation Mr. Otto was appointed Reporter of the Supreme Court of the United States, and held the post from 1875 to 1882, publishing sixteen volumes.

JOHN C. BANCROFT DAVIS.

The ninth Reporter of the Supreme Court was John C. Bancroft Davis, the son of Hon. John Davis, of Union, Massachusetts, and a nephew of George Bancroft, the historian. The father was a United States Senator, and a noted advocate of the policy of Protection. The son was born at Worcester, Mass., on the 29th of December, 1822, graduated from Harvard in 1840, read law, and entered upon an active practice. In 1849 when his uncle, Mr. Bancroft, left the English Court, he succeeded John R. Brodhead as Secretary of the Legation, and acted as *Chargé d'Affaires* for several months in that and the two succeeding years. He resigned in 1852, and became the American correspondent of the *London Times* from 1854 to 1861, and during that time practiced law in New York City. In 1868 he was a member of the New York Legislature, and the following year was appointed Assistant Secretary of State. In 1871 he became the American Secretary of the High Joint Commission that concluded the Treaty of Washington. He prepared the American case for submission to the Geneva Tribunal of Arbitration on the Alabama claims, and served as the Agent of the United States in prosecuting those claims before that High Court. In January, 1873, he returned to the United States and re-

sumed his place as Assistant Secretary of State. While holding this office he acted as arbitrator in disputes between Great Britain and Portugal. In July, 1874, he was appointed United States Minister to the German Empire. Upon his return from the Berlin mission, he was made Judge of the United States Court of Claims, in the District of Columbia, and served from January, 1878, until December, 1881. He was then again appointed Assistant Secretary of State, but resigned after six months' service. In November, 1882, he was re-appointed Judge of the Court of Claims, and on the 5th of November, 1883, became the Reporter of the Decisions of the Supreme Court of the United States. He has published United States Reports, Volumes 108 to 138 inclusive. He is a painstaking and accurate historian, thoroughly imbued with the true historical spirit, and has classified and arranged the precious but almost forgotten matter of historical interest in the Clerk's Office of the Supreme Court. He has rescued and had printed in the appendices to his Reports much valuable historical matter relating to the judicial functions of the Government prior to the adoption of the Constitution. He has also published omitted cases in the Appendix to Volume 131, U. S. Reports. He has annotated an edition of the Treaties of the United States, and published in French a treatise on the practice of American Courts.

CHARLES HENRY BUTLER.

After a service of nineteen years, his labors appearing in seventy-nine volumes, Judge John C. Bancroft Davis resigned his position as Reporter, and his place was filled by the appointment on December 4, 1902, of Charles Henry Butler, Esquire, the present Reporter of Cases adjudged in the Supreme Court of the United States.

Mr. Butler was born in the City of New York, June 18, 1859. His relations to the court of which he is now an officer are hereditary. His father, the late William Allen Butler, was for half a century one of the leading lawyers of that city, conspicuous as an advocate at the bar of our highest courts; the president of the American Bar Association and the New York City Bar Association, and, in 1890, the author of one of the principal addresses at the celebration of the Centennial Anniversary of the Organization of the Supreme Court of the United States. He also attained a great literary reputation, his *chef d'œuvre* being the well-known poem "Nothing to Wear."

His paternal grandfather was Benjamin F. Butler, who was one of the revisers of the Statute Law of New York in 1834, and Attorney General of the United States during the administrations of Andrew Jackson and Martin Van Buren. His maternal grandfather was Charles Henry Marshall, at first a captain, and afterwards proprietor of the Black Ball Line of packets, which were the ocean greyhounds between New York and Liverpool in pre-steam transportation days.

Mr. Butler was educated at local schools at Yonkers, N. Y., where his father's family and himself have resided since 1865. He entered Princeton College as a member of the class of 1880-81, but withdrew before graduation in 1878 to enter his father's law office in New York, where he studied law, being admitted to practice in 1882. Since that time he has been engaged in active practice in the City of New York, having been connected successively with the firms of Holt & Butler, Butler & Wyckoff and Butler & Horwood.

In the midst of professional duties he found time to devote himself to the study of general jurisprudence and international law. In recognition of his learning, in 1898, he was appointed legal expert to the Anglo-American Joint High Commission.

Like his predecessors, Wheaton, Wallace and Davis, he is an author, and has published a number of brochures on subjects of international law. The best known were under the titles: "The Relations of the United States with Spain," "Intervention the Proper Course," "Freedom of Private Property at Sea from Capture During War." In these he supported the views of Franklin, Adams, Fish and other American statesmen. They attracted the attention of President McKinley and his cabinet, and became the basis of the recommendations made by the President in his message of December, 1898.

In 1902, he published in two volumes "The Treaty-Making Power of the United States."

He has published three volumes of Reports, beginning with Number 187, and has introduced several new features of value to the profession. With the consent of the Court, he has arranged with the publishers to issue temporary parts of volumes on the first and fifteenth of every month, which will contain all decisions rendered by the Court up to the time of going to press of each part respectively. The parts so issued will be for temporary use; new bound volumes will be furnished as soon as completed and published. By this method it is hoped to make the United States Reports the earliest and most convenient publication, as well as the only official reports of the decisions of the Supreme Court of the United States.

He has also introduced, under the name of each Justice rendering opinions, a complete list of the opinions to be credited to each.

CLERKS OF THE SUPREME COURT.

The first Clerk of the Supreme Court of the United States was JOHN TUCKER, the selection of Chief Justice Jay, who spoke in terms of high praise of his courtesy and affability. He was a native of Newbury (Old Town), Massachu-

setts, where he was born on the 11th of August, 1753. The son of an eminent divine, he was carefully educated at Dummer Academy, at that time one of the best schools in New England. In 1770 he entered Harvard University, and graduated in 1774. After spending some years in the study of the law, he was appointed in 1783 junior clerk of the Supreme Judicial Court of Massachusetts. While holding this position, he was summoned on the 3rd of February to New York, then the seat of the National Government, to open the books of record of the Supreme Court of the United States. A fac simile of his hand-writing upon the first pages of the minutes, which are interesting as recording the events connected with the actual organization of the Court, is to be found in the Appendix to the 134th Volume U. S. Reports, p. 712. His hand-writing was round and clerkly; but he consistently misspelled the name of Mr. Justice Wilson,—a fact to which Mr. Davis, the present reporter of the Court, calls attention.

On the 1st of August, 1791, he resigned his place, and returned to Boston, resuming his duties as Clerk of the Supreme Judicial Court of Massachusetts, and continued in this place until his death on the 27th of February, 1825. He is said to have been a very popular man, well known throughout the State as "Clerk Tucker," or as "Judge Tucker." He was a man of commanding figure, and those who remembered him spoke of him as wearing a cheery countenance which was in itself "a perfect benediction."

The second Clerk of the Court was SAMUEL BAYARD, the fourth son of Col. John H. Bayard, of the distinguished Delaware family of that name. He was born in Philadelphia on the 11th of January, 1767, and died at Princeton, N. J., on

the 12th of May, 1840. After a preparatory course at grammar schools he entered Princeton College, and graduated in 1784 as the valedictorian. He subsequently studied law and practiced actively for seven years in Philadelphia. His appointment as the successor of Mr. Tucker was made upon the first of August, 1791, and he held the place until August 15, 1800. During the greater part of his term, however, he was absent and his duties were performed by Elias B. Caldwell. After the ratification of Jay's Treaty in 1794, Mr. Bayard was appointed by President Washington as agent of the United States to prosecute claims before the British Admiralty Courts, and this led to a residence in the City of London for four years. Upon his return to this country he went to New Rochelle, New York, and was appointed by Governor Jay Presiding Judge of West Chester County. In 1803 he resigned this office, removed to New York City, and resumed the practice of the law. Three years later he purchased an estate at Princeton, N. J., and was for several years a member of the State Legislature, and for some years acted as Presiding Judge of the Court of Common Pleas of Somerset County. He was one of the founders of the Princeton Theological Seminary, and was an unsuccessful candidate for Congress upon the Federalist ticket in 1814.

The third Clerk was ELIAS B. CALDWELL, named after Elias Boudinot, who among his many claims to distinction was the first to be admitted to the bar of the Supreme Court of the United States. Mr. Caldwell was born on the 3d of April, 1776. His mother was murdered by a British soldier when he was but two years old, and three years later his father, the Rev. James Caldwell, was murdered in cold blood by an Irish soldier. The orphan boy was then adopted

by the celebrated man for whom he was named. After a preliminary education he entered Princeton College and graduated in 1796. While Mr. Bayard was absent he acted as Clerk of the Supreme Court of the United States, and on August 5th, 1800, was duly appointed Clerk, serving until his death in 1825. He was one of the principal founders, in 1817, of the American Colonization Society, and was a zealous advocate of African colonization. His name was given to one of the towns of Liberia. He had been licensed as a preacher by the Presbytery, and was accustomed to occupy vacant pulpits on the Sabbath.

WILLIAM GRIFFITH, the fourth Clerk, was the son of a physician of Bound Brook, Somerset Co., N. J., and was born in the year 1766. He studied law in the office of Elisha Boudinot at Newark, was licensed as an attorney in 1778, and in due time became a counsellor, and in 1788 was called to be a Sergeant. He became a learned lawyer, and a very able advocate, acquiring a large practice, devoting himself to business with indefatigable industry, and mastering the land titles of his native State, and the doctrines of the common law relating to real estate. In 1796 he published a treatise on the jurisdiction and proceedings of justices of the peace, with an appendix containing advice to executors and administrators, and an outline of the law of landlord and tenant. Three years later he published a series of essays exposing the defects of the Constitution of his native State and urging a popular convention to revise it. He held the office of Surrogate and in 1801 was appointed one of the Judges of the United States Circuit Court for the Third Circuit, his associates being William Tilghman, afterwards Chief Justice of Pennsylvania, and Richard Bassett, the Chief Justice of Delaware, and is

thus known to fame as one of "the midnight judges." The causes decided by this court, which was in existence but a year, are to be found in a small volume entitled "Reports of Cases Adjudged in the Circuit Court of the U. S. for the Third Circuit," by John B. Wallace. Resuming business as an advocate, he met with but little success, and engaged in unfortunate land speculations, and the business of manufacturing woolen and cotton goods, of which he was ignorant. He then became a member of the Legislature, and exercised a powerful influence. He prepared three volumes of the "Annual Register of the United States" and wrote "Historical Notes of the American Colonies and Revolutions from 1754 to 1775." Upon the death of Mr. Caldwell, he was appointed Clerk of the Supreme Court of the United States, but died within a few months.

The fifth Clerk was WILLIAM THOMAS CARROLL, who was born at Bellevue, Maryland, on the 2d of March, 1802. After receiving an ordinary English education, he was sent to Emmitsburg, from which he graduated at the early age of twenty years. He studied law at Litchfield, Connecticut; was admitted to the Bar, and shortly afterwards was appointed lecturer at the Law Department of Columbia College, in the District of Columbia. His appointment as Clerk of the Supreme Court of the United States was dated January 28th, 1827, and he continued to discharge the duties of this office until his death, on the 13th of July, 1863. Chief Justice Taney said: "When we are appointing a successor to Mr. Carroll, it is but justice to his memory to say, that he was an accomplished and faithful officer, prompt and exact in business, and courteous in manner, and during the whole period of his judicial life discharged the duties of his office

with justice to the public and the suitors, and to the entire satisfaction of every member of the Court."

The sixth Clerk was the well-remembered DANIEL WESLEY MIDDLETON, who for more than fifty-three years was closely connected with the work of the Court. He was born on the first of May, 1805, and died on the 27th of April, 1880. At the time of Mr. Carroll's appointment, in 1827, Mr. Middleton, at the age of twenty-two, was acting as an assistant to the Clerk, and was immediately promoted to the position of deputy. His handwriting first appears on the records of the Court under date of the 7th of February, 1825. From that time until his death, he was, without interruption, as remarked by Chief Justice Waite, actively engaged in the business of the office, and even a whisper of complaint against him in any particular never reached the ears of the Court. He had seen Marshall, Taney, Chase and Waite upon the bench. Three Chief Justices and eighteen Associate Justices died after his service began. He had listened to Pinkney, Wirt and Webster at the bar; he had seen John Adams and Thomas Jefferson, and could state with clearness, fourteen years after the close of the Civil War, his recollections of them. Born within an arrow's flight of the Capitol, he had seen, in 1814, the Capitol in flames, and a new edifice arise, and for nearly sixty years had lived daily beneath the dome. Upon the death of Mr. Carroll, in 1863, he was appointed his successor by the unanimous vote of the Court. Discreet, urbane, courteous and painstaking, the benevolence and gentleness of his character endeared him to both bench and bar.

The present Clerk of the Supreme Court is JAMES HALL McKENNEY, who was born on the 12th of July, 1837, near

Bel-Air, in the State of Maryland. He became a resident of Washington City in December, 1845, and in 1853 entered the office of the Clerk of the United States Circuit Court for the District of Columbia. Five years later he was appointed junior clerk of the Supreme Court of the United States by Mr. Carroll, and on the appointment of Mr. Middleton as Clerk, became the acting deputy, and after the authorization by law of the appointment of a Deputy Clerk, by the United States Circuit Courts, he was appointed to that position, which he occupied until the 10th of May, 1880, when he was selected by the Supreme Court of the United States as Mr. Middleton's successor. The unanimity of the Bench in voting for him was marked by the exertions of Mr. Justice Hunt, who, although confined to the house by serious illness, and not having been to the Court room for several months, left his chambers and went to the Capitol to declare his appreciation of Mr. McKenney by casting his vote for him.

Mr. McKenney was also elected and served as the Secretary of the Electoral Commission in 1877.

Closely associated for many years with the work of the Court, deeply interested in the history of the tribunal, and guarding its precious records with jealous care, vigilant, attentive and courteous, collecting with diligence the traditions of the Court, and making the only collection of the portraits of the Clerks known to exist, he has on all occasions upheld the hands of those interested in preserving and extending the history and influence of the tribunal, and has given universal satisfaction to the members of both bench and bar.

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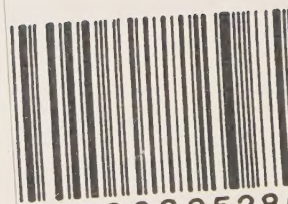
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